No. 87-1485-CFX
Status: GRANTED

Title: Arthur J. Blanchard, Petitioner
v.
James Bergeron, et al.

Docketed:
March 5, 1988

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Rosen,William W.

Counsel for respondent: Guidry III,Edmond L.

Entry	Date	Note	Proceedings and Orders
1	Jan 14 1988		Application for extension of time to file petition and order granting same until March 9, 1988 (White, January 15, 1988).
2	Mar 5 1988	G	Petition for writ of certiorari filed.
3	Apr 6 1988		DISTRIBUTED. April 22, 1988
4	May 2 1988	F	Response requested -- BRW, TM, JPS, SOC.
5	May 31 1988		Brief of respondent James Bergeron, Sheriff Charles A. Fuselier in opposition filed.
6	Jun 7 1988		REDISTRIBUTED. June 23, 1988
7	Jun 27 1988		Petition GRANTED.
			**********
9	Jul 13 1988		Order extending time to file brief of petitioner on the merits until August 31, 1988.
10	Jul 28 1988	G	Motion of petitioner to dispense with printing the joint appendix filed.
11	Aug 27 1988		Brief of petitioner Arthur J. Blanchard filed.
12	Aug 29 1988		Record filed.
		*	Certified copy of original record and proceedings, 2 volumes, received.
14	Aug 29 1988		Brief amicus curiae of Advocacy Center for Elderly and Disabled, et al. filed.
13	Aug 30 1988		Brief amici curiae of Farnsworth, Saperstein & Seligman, et al. filed.
15	Aug 31 1988		Brief amicus curiae of National Assn. of Legal Assistants, Inc. filed.
16	Sep 15 1988		Motion of petitioner to dispense with printing the joint appendix GRANTED.
17	Sep 30 1988		Brief of respondent James Bergeron and Sheriff Charles A. Fuselier filed.
18	Oct 7 1988		CIRCULATED.
19	Oct 31 1988		Set for argument. Monday, November 28, 1988. (2nd case) (1 hr.)
20	Nov 28 1988		ARGUED.

87 1485

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ARTHUR J. BLANCHARD

Petitioner

V.

**JAMES BERGERON,
SHERIFF CHARLES FUSELIER,
ABC INSURANCE COMPANY,
DEF INSURANCE COMPANY,
BARRY BREAUX, OUDREY GROS, JR.,
DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE,
GHI INSURANCE COMPANY**

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**WILLIAM W. ROSEN,
ATTORNEY AT LAW
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Telephone: (504) 581-4892**

**ATTORNEY FOR PETITIONER
ARTHUR J. BLANCHARD**

QUESTIONS PRESENTED

After a successful civil rights trial under 42 U.S.C. §§ 1983 and 1988, compensatory and punitive damages were awarded to the Plaintiff, Arthur J. Blanchard. Counsel, under § 1988, made application for an attorney's fee with all supporting documents. The district court awarded a fee of SEVENTY-FIVE HUNDRED ($7,500.00) DOLLARS. Costs and expenses were awarded in the amount of $886.92. Counsel considered both amounts insufficient for the time and effort involved. As appeal was taken to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, by Judgment rendered November 10, 1987, lowered counsel's fee to $4,000.00 holding that there was a contingent fee agreement and the agreement served as a "cap" on the amount of attorney's fee recoverable. In adhering to that theory, the Court did not consider nor did it include as a part of the fee the time spent by and valuable services of paralegals and law clerks.

The questions presented, therefore, are:

1. Does an agreement between the client and his counsel serve as a "cap" to limit the award of attorney's fees under the Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. § 1988)?

2. Should the time of paralegals and law clerks be considered in the award of a reasonable attorney's fee under 42 U.S.C. § 1988?

LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

The actual parties at interest in this proceeding are James Bergeron (former Deputy Sheriff), Sheriff Charles Fuselier, (Sheriff of St. Martin Parish, Louisiana), American Druggist Insurance Company (in Liquidation), and the Louisiana Insurance Guarantee Association. All interests are represented through one attorney, Mr. Edmond L. Guidry, III, Attorney at Law, Guidry & Guidry, 324 S. Main Street, St. Martinville, Louisiana 70582. There are no other parties at interest in the present proceeding despite their appearance in the original title.

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IN THE

SUPREME COURT

UNITED STATES OF AMERICA

OCTOBER TERM, 1987

NO. _____

ARTHUR J. BLANCHARD

Petitioner

V.

JAMES BERGERON,
SHERIFF CHARLES FUSELIER,
ABC INSURANCE COMPANY,
DEF INSURANCE COMPANY,
BARRY BREAUX, OUDREY GROS, JR.,
DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE,
GHI INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Arthur J. Blanchard, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 831 F.2d 563 (5th Cir. 1987) and is reprinted in the Appendix at pages 1A - 5A.

There are two opinions from the United States District Court for the Western District of Louisiana. They are:

A. On Attorney's fees and costs: Judgment from the Monroe Division entered October 23, 1986 (Appendix pages 6A through 16A.)

B. The original Judgment on the jury verdict from the Lafayette Division entered May 30, 1986 (Appendix pages 17A through 18A).

JURISDICTION

The Judgment of the Court of Appeals, Fifth Circuit, was entered on November 10, 1987. The Supreme Court granted an extension of time to March 9, 1988, to file this Petition for Writ of Certiorari. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101 (c).

STATUTE INVOLVED

The original statutes under which this matter was brought before the United States District Court were 42 U.S.C. § 1983 and 1988.

This application for fees is brought under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (Appendix page 20A).

STATEMENT OF THE CASE

This Civil Rights case was originally filed in the United States District Court for the Western District of Louisiana (Lafayette Division) under 42 U.S.C. §§ 1983 and 1988. After a jury trial, it was found that the Plaintiff, ARTHUR J. BLANCHARD, had been assaulted without justification by Deputy Sheriff James Bergeron, a member of the Sheriff's Office of St. Martin Parish, Louisiana. The assault took place in Oudrey's Odyssey Lounge. The Lounge, its owners and insurer were joined under pendent jurisdiction. In the beating Mr. Blanchard suffered a broken jaw and other lesser injuries.

After entry of the Judgment on the verdict, counsel for Arthur Blanchard submitted detailed time, cost, and expense records to support his application for an attorney's fee and costs under 42 U.S.C. § 1988. Counsel's deposition was taken by opposing counsel. The fee application included substantial time of paralegals and law clerks. The original fee requested included time spent on the civil rights case and trial, and on the research, brief, deposition, etc., for the fee application. It totaled $36,780.00. Out-of-pocket costs and expenses amounted to $5,511.92. Of those amounts, the District Court awarded an attorney's fee of $7,500.00 plus costs and expenses in the amount of $886.92. Counsel appealed to the Court of Appeals for the Fifth Circuit.

As of the time of submission of the brief to the Fifth Circuit (but not including services or time for preparation for oral argument or presentation of the case) counsel increased the total fee requested to $42,699.30. Costs increased by $329.32 for a total of $5,841.24.

The Court of Appeals for the Fifth Circuit, by Judgment dated November 10, 1987, decreed that the Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974) ". . . by which we are bound," required that a contingent fee contract ". . . serves as a cap on the amount of the attorney's fee to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee." *Blanchard v. Bergeron, et al*, 831 F.2d 563, 564 (5th Cir. 1987).

This Petition for Writ of Certiorari should be granted for the following reasons:

1. The decision of the Fifth Circuit is in conflict with the rulings of virtually every other United States Circuit. Supreme Court Rule 17.1(a).

2. The Fifth Circuit opinion appears to violate the directives of this Court's decision in *City of Riverside, et al. v. Santos Rivera*, _____ U.S. _____ , 106 S.Ct. 2686 (1986) on the issue of a contingent fee contract limiting an attorney's fee recovery under 42 U.S.C. § 1988. Supreme Court Rule 17.1(c)

3. *If* the *City of Riverside* case is not definitive on that issue, then each federal Court of Appeals has made a statement on this issue, but it has not been decided by the Supreme Court of the United States. An associated issue is whether or not the time of paralegals and law clerks should be included in a civil rights attorney's fee award. These are important questions of federal law in the civil rights area which have not been, but should be, settled by this Court. Supreme Court Rule 17.1(c)

4. The Fifth Circuit's opinion is factually and procedurally confusing in that it fails to state whether the fee, *if* limited by the contingent agreement, is to be paid from the damage award received by Mr. Blanchard or to be paid by the Defendant. The opinion also is confusing in that it is written in terms of not allowing a "windfall" to the appellant (the client) and disregards the issue of a reasonable fee to appellant's attorney.

ARGUMENT

Argument will be presented under four (4) categories:

I. *Blanchard* Conflicts With Rulings of The United States Supreme Court

II. *Blanchard* (Fifth Circuit) Conflicts With All Other Circuit Courts

III. *Blanchard* Failed To Include Paralegal And Law Clerk Time

IV. Factual And Procedural Confusion in *Blanchard*

1. *BLANCHARD* CONFLICTS WITH RULINGS OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit's decision in *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987) appears to conflict with the ruling of this Court in *City of Riverside, et al v. Rivera*, _____ U.S. _____ , 106 S.Ct. 2686 (1986). In that case, the Supreme Court Stated that:

> "We reject the proposition that fee awards under § 1988 should necessarily be propor-

tionate to the amount of damages a civil rights plaintiff actually recovers." Id. at 2694.

"A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988." Id. at 2695.

"A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the Courts. This is totally inconsistent with the Congress' purpose in enacting § 1988." Id. at 2695.

". . . [W]e find no evidence that Congress intended that, in order to avoid 'windfalls to attorneys,' attorney's fees be proportionate to the amount of damages a civil rights' plaintiff may recover." Id. at 2697.

"In the absence of any indication that Congress intended to adopt a strict rule that attorney's fees under § 1988 be proportionate to damages recovered, we decline to adopt such a rule ourselves." Id. at 2698.

Although this Court did not specifically use the word "contingent fee contract", it is difficult to understand how the Court of Appeals for the Fifth Circuit could have interpreted the language otherwise. *If* the Supreme Court language in *City of Riverside* is intended to apply to contingent fee agreements, the the Fifth Circuit's ruling is in direct conflict and should be reviewed by this Court. See also *Pennsylvania v. Delaware Valley Citizens' Council*, _____ U.S. _____, 107 S.Ct. 3078, 3085(B) (1987).

If this Court's *City of Riverside* decision is not intended to apply to contingent fee contracts, then Certiorari should be granted so that this Court may review the decisions of all Circuits and determine a consistent, national policy.

II. *BLANCHARD* (FIFTH CIRCUIT) CONFLICTS WITH ALL OTHER CIRCUITS

A Writ of Certiorari should be granted because the Fifth Circuit is in conflict with virtually every other Circuit of the United States. Every other Circuit now subscribes to the lodestar method of computing attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976. At a minimum, the lodestar approach is the beginning point. Many Circuits have subscribed to the 12 factors set out by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, supra at 717-719, but none adhere to a rigid standard that a contingent fee agreement sets an upper limit on recovery of civil rights attorney's fees. The Fifth Circuit in the *Blanchard* decision states that it was "bound" by *Johnson* to set the cap, apparently referring to dictum[1] in that 1974 case decided before the Civil Rights Attorney's Fee Award Act of 1976.

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1. "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." *Johnson, supra* at 718. However: ". . . Judge Holoway noted that problems arise in applying the *Johnson* dictum. . . ." *Cooper v. Singer*, 719 F.2d 1496, 1500, note 6 (10th Cir. 1983) and "*Johnson* was a civil rights case decided before the enactment of the Civil Rights Attorney's Fee Award Act 42 U.S.C. § 1988 (1976), and thus is inapplicable." *Fleet Investment Co. Inc. v. Rogers*, 620 F.2d 792, 793, note 1 (10th Cir. 1980).

The Circuit opinions which are contrary to the holding of the Fifth Circuit *Blanchard* decision are:

The First Circuit: *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985); *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978) [". . . [W]e reiterate that a fee arrangement is irrelevant to the issue of entitlement and should not enter into the determination of the amount of a reasonable fee."] Id. at 649.

Second Circuit: *Lewis v. Coughlin*, 801 F.2d 570 (2d Cir. 1986) ["Contingency is but one of twelve factors which the Supreme Court has said should be considered in fixing a reasonable attorney's fee" Id. at 575, citing *City of Riverside v. Rivera*, supra]; *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982).

Third Circuit: *Sullivan v. Crown Paperboard Co., Inc.*, 719 F.2d 667 (3d Cir. 1983) ["At its clearest, the legislative mandate would therefore have courts consider the existence of contingency arrangements, while not allowing such consideration to thwart the enforcement of the substantive statutory rights that gave rise to the fee award provision." Id. at 669]; *Durett v. Cohen*, 790 F.2d 360 (3d Cir. 1986).

Fourth Circuit: *Vaughns v. Board of Education of Prince George's County*, 770 F.2d 1244 (4th Cir. 1985); *Harrington v. Empire Const. Co.*, 167 F.2d 389 (4th Cir. 1948).

Sixth Circuit: *United Slate Tile & Composition Roofers et al v. G. & M. Roofing and Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984) ["The existence of a contingency contract may be considered by the District Court as an element to be considered in determining the market value of an attorney's services, but the Court is not bound in any sense by that agreement." Id. at 504]

Seventh Circuit: *Lenard v. Village of Melrose Park*, 699 F.2d 874 (7th Cir. 1983) ["The trial court may consider as a factor the contingent fee contract, but it is not to be an automatic limit on the attorney fee award." Id. at 899]; *Sanchez v. Sanchez*, 688 F.2d 503 (7th Cir. 1982).

Eighth Circuit: *Sisco v. J. S. Alberici Construction Co., Inc.*, 733 F.2d 55 (8th Cir. 1984) ["We hold that a percentage fixed in a contingent-fee contract is not an absolute ceiling on fee awards. We reverse and remand for a determination by the District Court of a proper fee award in this case." Id. at 56. "These effects [[limitation of fee to a contingent fee contract]] would run counter to the intention of Congress to encourage successful, civil-rights litigation" Id. at 57.]

Ninth Circuit: *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) [". . . Section 1988 authorizes the award of a reasonable fee not necessarily limited to the fee agreed upon by the parties." Id. at 1408.]

Tenth Circuit: *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) ["We therefore conclude that a section 1988 fee award should not be limited by a contingent fee agreement between the attorney and his client." Id. at 1503 (this is an excellent analysis of Section 1988 awards)]; *Fleet Investment Co., Inc. v. Rogers*, 620 F.2d 792 (10th Cir. 1980) [The limitation of fees in civil rights cases to a contingent fee contract ". . . would obviously frustrate the intent of Congress and we refuse to adopt such a rule." Id. at 793.]

Eleventh Circuit: The Fifth Circuit opinion in *Blanchard* cites the Eleventh Circuit case of *Pharr v. Housing Authority of City of Pritchard, Alabama*, 704 F.2d 1216 (11th Cir. *1983*) as support for its ruling that a contingent fee contract sets the upper limit in a § 1988 fee case. The Fifth Circuit

could have better examined *Tic-X-Press, Inc. v. Omni Promotions Company of Georgia*, 815 F.2d 1407 (11th Cir. *1987*) in which that argument was rejected with the Court saying, ". . . the District Court decided to determine a 'reasonable' fee by applying the twelve factors articulated in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), without regard to a contingency fee agreement. Accordingly, the Court analyzed TXP's fee request in light of the *Johnson* guidelines and calculated the plaintiff's lodestar at $118, 545.00 concluding that the hours expended and rates charged were reasonable." Id. at 1423 The Eleventh Circuit affirmed the District Court's award. See also *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. *1986*), in which paralegal time was added to attorney time and the contingent fee agreement was "enhanced" by 35%. See also *Watford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985), cert. den. _____ U.S. _____ , 105 S.Ct. 3531 (1985) saying, "However, in assigning weight to other factors '[n]o one *Johnson* criterion should be stressed to the neglect of others' [citation omitted]. Although the amount involved is generally a factor to be considered, a fee award may not be limited to a 'modest proportion of the total monetary recovery' or even to 'the [total] amount recovered' " [citations omitted] Id. at 1569.

District of Columbia Circuit: *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984) cert. den. 472 U.S. 1021, 1055 S.Ct. 3488 [supporting lodestar, the Court said, "The fee award must be recalculated according to the market rates established by those firms in their everyday practice." Id. at 30. The Court does not state whether or not there was a contingency fee contract. It refused to approve a "contingency multiplier" and found no ground for a "contingency enhancer," both of which had been added to the lodestar calculation by the trial court.]; *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. en banc 1980) ["Contingency

adjustments . . . are entirely unrelated to the 'contingent fee' arrangements that are typical in plaintiffs' tort representation. . . . The Contingency adjustment is a percentage increase in the 'lodestar' to reflect the risk that no fee will be obtained" Id. at 893.]

The national policy question to be reviewed in the *Blanchard* case is broader than the *Blanchard* facts. It is respectfully suggested that if this Fifth Circuit opinion is allowed to stand, it may serve to deny attorneys in successful civil rights actions a fee in such varied situations as (1) where the attorney and client have a contingent fee agreement contract but the client becomes bankrupt, [all funds could be held by the trustee], or (2) where the client is or becomes incompetent and the validity of the contract is in question, or (3) if there were no prior fee agreement with the client. A clear, national interpretation will serve to encourage participation by competent counsel who can rely upon a Supreme Court decision to insure an award of a reasonable fee in these highly contested civil rights matters. It will enhance the intent of Congress in all of the civil rights statutes.

III. *BLANCHARD* FAILED TO INCLUDE PARALEGAL AND LAW CLERK TIME

The *Blanchard* decision failed to account for the many hours of work performed by counsel's paralegals and law clerks to whom various tasks were assigned (at a substantially reduced rate calculation) and whose work provided excellent results to counsel and to the client. The *Blanchard* court stated, "Moreover, any hours 'billed' by law clerks and paralegals would also naturally be included within the contingent fee." *Blanchard* supra at 432.

The Supreme Court of the United States has approved compensation for law clerks in a similar case when it affirmed 84.5 hours of law clerk time at $25.00 per hour as part of a $245,456.25 fee. See *City of Riverside*, supra at 2687 and 2698. The Fourth Circuit, in affirming a fee of $372,942.00, approved $40.00 to $60.00 per hour for law clerks and $35.00 to $50.00 per hour for paralegals. *Vaughns v. Board of Education of Prince George's County*, 770 F.2d 1244, 1245 (4th Cir. 1985). The Sixth Circuit included paralegals in a § 1988 award in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979). In 1983, the Tenth Circuit said, "We recognize the increasing widespread custom of separately billing for the services of paralegals and law students who serve as clerks." *Ramos v. Lamm*, 713 F.2d 546 at 558 (10th Cir. 1983). The Eleventh Circuit included, as attorney fees, paralegal time at $30.00 per hour. *Walters v. City of Atlanta*, supra at 1151.

The United States Supreme Court has not specifically ruled upon the validity of the use of paralegals and law clerks in today's legal market. The indications, however, are clear that this Court and many Circuits recognize the utility of using of paraprofessionals in saving time to the supervising attorney and saving money to the client. It is respectfully suggested that it is time for specific recognition of these facts by the Supreme Court of the United States. The time of paralegals and law clerks should be considered part of and included in the calculation of total service for which an attorney's fee is due.

IV. FACTUAL AND PROCEDURAL CONFUSION IN *BLANCHARD*

In addition to the Fifth Circuit's failure in *Blanchard* to follow a prior decision of the United States Supreme Court and disregarding *Blanchard's* conflict with every other

Circuit, the opinion is factually and procedurally confusing. Does the opinion mean that Arthur Blanchard must pay the $4,000.00 fee out of his own damage recovery, or does it mean that the Defendants pay the $4,000.00 fee? The decision is silent. If it is the latter, clearly the fee is not the classic contingent fee since, in that situation, an attorney accepts as a fee part of that which his *client* recovers. If it is the former, then the decision is violative of the intent of Congress and operates to the benefit of those who have violated civil rights and to the detriment of the victim. *City of Riverside*, supra at 2694, 2697, 2698. See also *Cooper v. Singer*, supra.

The Fifth Circuit decision in *Blanchard* also is confusing in the Court's statement that, "[T]he reason enunciated for this limit [the contingent cap allegedly required by *Johnson*] is that an appellant will not be given a windfall via § 1988." It is not the client who receives the attorney's fee as suggested by the Fifth Circuit, but it is the attorney who receives the fee. And the attorney does not receive a "windfall" if his fee is properly awarded under *Johnson* and lodestar standards are *correctly applied*. *Blum v. Stenson*, _____ U.S. _____, 104 S.Ct. 1541, 1546 (1984).

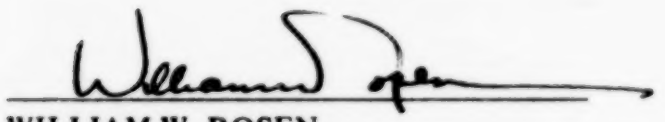
CONCLUSION

The Fifth Circuit's ruling in this case conflicts with all other Circuits. S.Ct. Rule 17.1(a). Whether or not there should be any "cap" upon a properly calculated attorney's fee under 42 U.S.C. § 1988 and whether or not paralegal and law clerk time should be part of an award under the Civil Rights Attorney's Fee Award Act are important questions of Federal law which have not been, but should be, settled by this Court. S.Ct. Rule 17.1(c) The *Blanchard* decision may, in fact, conflict with applicable decisions of the Supreme Court of the United States. Id. The *Blanchard*

decision is confusing and should be corrected on the issues of responsibility for fee payment and on the question of "windfall."

For these reasons, this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED:



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APPENDICIES

APPENDIX

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APPENDIX 1

ARTHUR J. BLANCHARD,
Plaintiff-Appellant,

v.

James BERGERON, Sheriff Charles Fuselier, ABC Insurance Company, DEF Insurance Company, Barry Breaux, Ouydrey Gros, Jr., Darrell Revere, Oudrey's Odyssey Lounge, GHI Insurance Company,
Defendants-Appellees.

No. 86-4832.

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1987.

Appeal was taken from judgment of the United States District Court for the Western District of Louisiana, Donald E. Walter, J., awarding attorney fees in civil rights action. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) successful civil rights plaintiff, who had entered into contingency agreement, was not entitled to recover total attorney fees of slightly over $40,000, and (2) expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award.

Affirmed as modified.

1. **Civil Rights KEY 13.17(6)**

Amount successful civil rights plaintiff is obligated to pay his attorney serves as cap on amount of attorney fees to be awarded, although court is not bound to enforce contract for unreasonably high fee.

2. **Civil Rights KEY 13.17(6)**

Successful civil rights plaintiff, who had entered into contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded–in this case, $4,000–was limited to a fee award of $4,000, and could not be awarded $7,500 in attorneys fees.

3. **Civil Rights KEY 13.17(8)**

Expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award in civil rights case, where fee itself was limited by parties' agreement with no provisions for expenses, and items claimed represented customary out-of-pocket charges and were not unreasonable in amount.

William W. Rosen, New Orleans, La., for plaintiff-appellant.

Edmond L. Guidry, III, Martinville, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, GARZA, and JONES, Circuit Judges:

EDITH H. JONES, Circuit Judge:

This appeal deals only with the district court's attorney fee award under the Civil Rights Act after the jury awarded appellant $5,000 compensatory and $5,000 punitive damages on his § 1983 claim. Although appellant sought total attorney fees and costs slightly over $40,000, the district court awarded $7,500 in attorney fees and $886.92 for costs and expenses. We reverse, because there is a controlling contingency fee agreement between the attorney and client.

The Supreme Court has instructed that the district court has discretion in determining the amount of a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). We will only overrule findings of fact which we find to be clearly erroneous, and the reasonableness of the total award will be judged according to the abuse of discretion standard. *Curtin v. Bill Hanna Ford, Inc.*, 822 F.2d 549 (5th Cir.1987).

FEES

The district court found that Appellant had a contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded–in this case, $4,000. While the record is not without doubt on this point, this factual finding is not clearly erroneous and is supported by deposition testimony of appellant's trial counsel. The district court applied this factual finding as one justification among several for adjusting the requested lodestar downward.

[1, 2] Appellant contends that a contingency fee agreement should be disregarded in determining a reasonable fee

in civil rights cases. Several circuits have so held. *Hammer v. Rios*, 769 F.2d 1404, 1408 (9th Cir.1985); *Cooper v. Singer*, 719 F.2d 1496, 1500 (10th Cir.1983); *Lenard v. Argento*, 699 F.2d 874, 900 (7th Cir.1983); *Sargeant v. Sharp*, 579 F.2d 645, 649 (1st Cir.1978). According to appellant, we should therefore ignore his contingency agreement and, overruling other aspects of the district court decision, award him a significantly higher amount. Appellant failed to cite our circuit's holding, by which we are bound that the amount a successful civil rights plaintiff is obligated to pay his attorney serves as a cap on the amount of attorney's fee to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir.1974). The reason enunciated for this limit is that an appellant will not be given a windfall via § 1988. "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay. . . ." *Id.* The Eleventh Circuit has also followed *Johnson*, reasoning that the contract between a plaintiff and his attorney represents their notion of a reasonable fee. *Pharr v. Housing Authority*, 704 F.2d 1216, 1218 (11th Cir. 1983). In reaching this conclusion, we disserve neither the appellant nor Congress's intention to foster enforcement of the Civil Rights Acts by means of fee-shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may decide not to accept another civil rights case on a contingent-fee contract, but the outcome of this case should not be a disincentive to handling civil rights cases upon different contractual terms. See, e.g., the contract in *Pharr*, supra. Finally, to the extent that fee awards in civil rights cases are intended to reflect fees charged "in the marketplace" for legal services, enforcement of the contingent fee contract here is appropriate.

Because the fee award must be limited to $4,000, we need not address Appellant's claims that the district court improperly reduced the number of hours in the lodestar calculation. Moreover, any hours "billed" by law clerks or paralegals would also naturally be included within the contingency fee.

EXPENSES

[3] Appellant argues that the district court erred in not awarding expenses for items incident to the attorney services such as photocopying, long distance telephone calls and travel. The district court held that such expenses represent overhead which is compensated for by the attorney fee, rendering additional compensation unwarranted. Where, however, the fee itself has been limited by the parties' agreement with no provision for expenses, Section 1988 may be employed to permit such an award. The items claimed by appellant represent customary out-of-pocket charges in this type of litigation and are not unreasonable in amount. To these, we must add the costs of depositions, which the district court denied, but which fall within Fed.R.Civ.Proc. 54(d). *See Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 (5th Cir.1982).

Thus, the judgment of the district court is modified to provide attorney fees of $4,000 and expenses of $4,499.52.

AFFIRMED AS MODIFIED.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

JUDGMENT ON ATTTORNEY'S FEES AND COSTS

Pursuant to the foregoing Ruling,

IT IS ORDERED, ADJUDGED and DECREED that plaintiff shall recover the reasonable attorney's fee of $7,500.00; and

IT IS FURTHER ORDER, ADJUDGED and DECREED that plaintiff shall recover as reasonable costs and expenses the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana, this 23rd day of October, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL.

RULING

Following trial of this action brought pursuant to 42 U.S.C. § 1983, plaintiff was awarded compensatory and punitive damages totaling $10,000.[1] Now, plaintiff has

1. Of the total judgment, defendants, James Bergeron and Charles Fuselier in his official capacity as Sheriff and Oudrey's Odyssey Lounge were liable in solido for compensatory damages totaling $5,000, 90 percent and 10 percent respectively. Plaintiff's § 1983 claim was dismissed against Fuseliar, thus resulting in judgement under § 1983 only against Bergeron. In keeping with this determination, the punitive damage award of $5,000 is only against Bergeron.

moved for an award of attorney's fees, costs and expenses in accord with the judgment entered June 3, 1986. The prevailing litigant in a civil rights action ordinarily is entitled to recover attorney's fees. *Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981). Pursuant to 42 U.S.C. § 1988, which provides in pertinent part,

> "[i]n any action or proceeding to enforce a provision of section [] . . . 1983 [of Title 42], . . . the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs,"

this award is left to the sound discretion of the trial court. *Id*. Here, plaintiff is a prevailing party within the meaning of this part.[2] The Court must now go about the task of determining the amount of the award.[3]

The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances.

2. § 1988, by its terms, permits an award of attorney's fees only to a "prevailing party." *Taylor*, 640 F.2d at 669. In determining prevailing party status, the focus is "not on the form of the final judgment but on the substance of the relief." *Tasby v. Wright*, 550 F.Supp. 262, 271 (N.D. Tx. 1982).

3. This circuit employs the "lodestar" method of determining such amount. *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983). The Court must articulate the basis for its award of attorney's fees, thus insuring meaningful appellate review of its discretion. *Harkless v. Sweeny Independent School District*, 608 F.2d 594, 596 (5th Cir. 1979). A meaningless exercise in parroting *Johnson's* criteria is not required *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974); instead, this analysis is to assure that the Court has arrived at a just compensation based on appropriate standards. *Tasby*, 550 F.Supp. at 275.

Hensley v. Eckerhart, 103 S.Ct. 1933, 1937 (1983). As noted by the Supreme Court in *Riverside v. Rivera*, slip op. no. 85-224 (June 27, 1986), the congressional intent for enacting this provision was to allow plaintiffs to enforce civil rights laws, especially under the adverse circumstances of an unpopular cause or where the amount of damages at stake would not otherwise make it feasible for them to do so.[4] *Id.* at 15. The expressed purposes of this provision are met in the present matter; nevertheless, §1983 was not intended to be a windfall for attorneys, for it is only "reasonable" fees that are recoverable.

A fee applicant must exercise "billing judgment" with respect to the number of hours for which he seeks compensation to ensure reasonableness.[5] *Rivera*, slip op. at 7 n. 4. "Billing judgment" excludes from a fee request "excessive, redundant, or otherwise unnecessary" hours. *Id.* Moreover, the applicant bears the burden of presenting an adequate accounting of his time to allow the court to make this

4. Quoting the Senate Reports, the Supreme Court noted, "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the National's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *See* S.Rep. No. 94-1011, p. 2 (1976) (hereafter Senate Report). *Rivera*, slip op. at 15.

5. "*Hensley* requires a fee applicant to exercise 'billing judgment' not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be reasonable. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." *Id.* at 424.

determination, failing such, the claim for fees shall be denied.[6] *Hensley*, 103 S.Ct. at 1941 and n. 12. In this matter, plaintiff's records are often inadequate and difficult to decipher. Many of his time sheets fail to inform the Court of how the time billed was spent; these vague claims are, therefore, Denied. However, the Court can evaluate some of the billed hours, for which recovery will be allowed.

Recognizing that prevailing parties in civil rights actions should ordinarily recover attorney's fees under § 1988 unless special circumstances would render such an award unjust, defendant contends the case at bar is one entailing such special circumstances. Defendant argues that plaintiff did not exercise "billing judgment" in submitting his fee request and, thus, should be denied recovery. The Court agrees that billing judgment was abused in this matter, where plaintiff claimed $42,291.92 in fees. Plaintiff did not limit his request to striking redundant or unnecessary hours.

6. The applicant must submit a full and accurate accounting of his time; the accounting must be based on contemporaneous records; and the accounting must give specifics such as the dates and nature of the work performed. *Hensley*, 103 S.Ct. at 1938, 1940. The record should be sufficiently detailed to enable the Court to determine what time was spent on different claims; it must also be detailed enough to enable the Court to determine if plaintiff's attorney is claiming compensation for hours that are redundant, excessive, or otherwise unnecessary. and to determine if the attorney has exercised "billing judgment" in submitting the fee application. *Id.* at 1938-41. Counsel should at least identify the general subject matter of his time expenditures, which plaintiff has repeatedly failed to do. *See Nadeau v. Helgemore*, 581 F.2d 275, 279 (1st Cir. 1978), "('As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a porper basis for determining how much time was spent on particular claims')."

For this simple § 1983 action, plaintiff has submitted a request for an award of attorney's fees that represents in excess of 385 hours–for counsel, two co-counsel, paralegals and law clerks. This application is unreasonable, but it does not fit within one of the recognized exceptions barring recovery.[7] However, the Court will consider this abuse of "billing judgment" in adjusting the award after the "lodestar" is calculated.

The Supreme Court in *Hensley*, 103 S.Ct. 1933, announced certain guidelines for calculating a reasonable attorney's fee. *Hensley* stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate." *Id*. at 1939. This figure, commonly referred to as the "lodestar," is the starting point in calculating a reasonable fee as contemplated by § 1988. *Rivera*, at 5. In reaching this "lodestar," the Supreme Court cautioned that "[t]he district court ... should exclude from this initial fee calculation hours that were not reasonably expended" on the litigation. *Hensley*, 103 S.Ct. at 1939-40.

7. The Fifth Circuit has recognized such special circumstances as would render an award under § 1988 unjust. *Taylor*, 640 F.2d at 668. Nevertheless, § 1988 requires a strong showing of special circumstances to justify denying an award of attorney's fees and costs to the prevailing party in a § 1983 claim. *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980). Arising only in unusual situations, special circumstances sufficient to deny an award of attorney's fees include a plaintiff's § 1983 claim which was essentially a tort claim for private monetary damages and an action where plaintiff's complaint was not instrumental in remedying a civil rights violation. *Id*. at 544-45. Also, the district court in *Clay v. Harris*, 583 F.Supp. 1314 (N.D. Ind. 1984), recognized another special circumstance for denying relief under § 1988 where a plaintiff prevailed but an award of attorney's fees would encourage numerous trivial lawsuits. Despite these exceptions, the jury clearly held that plaintiff's claim fell under the Constitution and § 1983. The Court holds the above special circumstances are not applicable to the case at bar.

In addition to those hours already excluded as unidentifiable, the Court also excludes hours billed in relation to a pendent state claim. Time spent researching issues concerning this claim which are distinguishable from his § 1983 are not recoverable.[8] Hours devoted specifically to this claim did not aid the outcome of the § 1983 action and are not reasonable within the meaning of § 1988.

To further aid the Court in making this assessment, the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), identifies twelve (12) factors to be considered in calculating a reasonable attorney's fee.[9] Here, neither the facts of this case nor the issues of law were novel or complex. Plaintiff's counsel rendered satisfactory service, but this was not a case of "exceptionable success." the case was filed in 1983, came to trial in 1986, and required less than three (3) days of trial. Motion practice in the course of the litigation was minimal. Preclusion of other employment should have been non-existent; time limitations were not a problem in this litigation. Of the hours claimed by plaintiff, the Court, after the above exclusions, will allow

8. Claims for time spent researching Louisiana damages and pendent jurisdiction did not aid the prosecution of plaintiff's § 1983 claim.

9. While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying § 1988 expressly endorse the analysis set forth in *Johnson*, *supra*. *Rivera* at 5. *See* Senate Report, p. 6; H.R. Rep. No. 94-1558, p. 8 (1976) (hereafter House Report). "These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d, at 717-719."

recovery for only 97 hours and 20 minutes–96 hours by Mr. Rosen and 1 hour and 20 minutes by co-counsel, Ms. Dombourian.

Calculation of the "lodestar" also involves the determination of a reasonable hourly rate. Plaintiff claims an hourly rate ranging from $100 through $150 per hour depending on senority–$150/hr. for 96 hours and $125/hr. for 1 hour and 20 minutes. Defendant argues these rates are unreasonable, suggesting a rate between $65 and $100 per hour. Taking notice of the customary fees in the community, the Court agrees that plaintiff's rates are high and holds that $100/hour is a reasonable rate.

After determining the "lodestar," which is presumed to be the reasonable fee contemplated by § 1988, *Rivera*, at 5, the *Hensley* court suggested other considerations that might lead the district court to adjust the lodestar figure upward or downward. *Id*. at 1939-40. Here, as noted earlier, plaintiff's abuse of "billing judgment" requires that the lodestar figure be adjusted downward. Further supporting this reduction is the elemental nature of this litigation and the contingency fee arrangement entered in this matter.[10] The lodestar of $9,720 is adjusted downward to $7,500.00.

There is also the question of costs which has yet to be determined. Plaintiff contends it is entitled to recover as costs photocopying expenses, travel expenses, mailing expenses, expert witness fees, deposition costs, paralegal and law clerk expenses. Defendant opposes this argument, suggesting only those costs specifically enumerated in 28 U.S.C. § 1920 or other statutes are recoverable. The Court agrees with defendants.

10. The contingency fee arrangement provided for 40 percent of whatever is collected–$4,000. Plaintiff's counsel will not be given a windfall via § 1988.

Following the recent Fifth Circuit opinion of *IWA v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986), § 1988 provides only for the recovery of attorney's fees by the prevailing party but does not include other expenses and cost of the litigation. *Id*. Even though the specific holding of *IWA*, *supra*, only concerned expert witness fees, the Court suggests a much more sweeping effect. *Id*. Noting the broad expanse of *IWA*, *supra*, this Court holds only those items recoverable as costs under § 1920[11] or other specific statutes are reasonable. Other costs are not recoverable.[12]

In light of the strong dissent by Judge Rubin in *IWA*, 790 F.2d at 1181, the Court also concludes the recovery of costs other than the ordinary witness fees and docket fees would be unreasonable under § 1988 and *Johnson*, *supra*. As to photocopying expenses, counsel have already been paid for preparing the memorandum or for researching the case that is being duplicated or the deposition copied. Similarly, travel costs, mailing costs and long-distance expenses amount to the recovery of the type of expenses usually associated with the

11. § 1920 provides, "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

12. Necessarily included within this exclusion are expenses for paralegals, secretairies and other support personnel.

practice of law and covered overhead expenses. Noting the simplicity of this matter, paralegal and law clerk fees were not necessitated so as to be reasonable. Whether excluded under *IWA*, *supra*, or by a reasonableness determination, items for costs and expenses are limited to those specifically enumerated. Of the $5,511.92 claimed by plaintiff, counsel may recover costs and expenses in the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana this 23d day of October, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE 10-23-86
BY d d
TO: Rosen
Guidry III
Gibbins
(stamp)

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
MAY 30 1986
ROBERT H. SHEMWELL, CLERK
BY d d
DEPUTY
(stamp)

JUDGMENT

After trial before the Court and a jury, commencing on May 20, 1986, and concluding on May 22, 1986, Honorable Donald E. Walter, District Judge, presiding, and the Court having instructed the jury to find a general verdict and to answer special interrogatories, and the jury having rendered a verdict and answered these interrogatories, which have been filed in the record;

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff, Arthur Blanchard, recover compensatory damages from defendants, James Bergeron and Charles Fuselier in his official capacity as Sheriff of St. Martin Parish liable for ninety percent (90%), and Oudrey's Odyssey Lounge liable for ten percent (10%), in the amount of Five Thousand and No/100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date this action was filed;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff recover punitive damages from defendant, James Bergeron, in the amount of Five Thousand and No /100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date judgment is entered;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's 42 U.S.C. § 1983 claim against defendant Charles Fuselier is Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's state law claims against defendants, Oudrey Gros, Jr., and Darrell Revere, are Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendant, James Bergeron, reasonable attorney fees to be later fixed by the Court; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendants, James Bergeron and Charles Fuselier in his official capacity, and Oudrey's Odyssey Lounge, reasonable costs to be later fixed by the Court.

JUDGMENT READ and SIGNED in Monroe, Louisiana, this 30th day of May, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Judgment Entered 6-3-86
By L J Sprott
Copy To _____
_____
_____
(stamp)

APPENDIX 4

42 U.S.C. § 1988.

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (As amended October 21, 1980, P.L. 96-481, Title II, § 205(c), 94 Stat. 2330.)

No. 87-1485

In The
Supreme Court of the United States
October Term, 1987

Arthur J. Blanchard,

Petitioner,

v.

James Bergeron, Sheriff Charles Fuselier, ABC Insurance Company, DEF Insurance Company, Barry Breaux, Oudrey Gros, Jr., Darrell Revere, Oudrey's Odyssey Lounge, and GHI Insurance Company,

Respondents.

RESPONDENTS OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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or call collect (402) 342-2831

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RESPONDENTS OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, James Bergeron and Sheriff Charles Fuselier, respectfully pray that the petition for writ of certiorari herein be denied.

———o———

STATEMENT OF THE CASE

In the action below, Arthur Blanchard appealed the Judgment of the trial court wherein he was awarded attorney's fees of SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7,500.00) DOLLARS, plus costs and expenses in the amount of EIGHT HUNDRED EIGHTY SIX AND 92/100 ($886.92). The original jury award which was not appealed, granted to Mr. Blanchard FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS IN compensatory damages and FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS in punitive damages for the alleged use of unreasonable force in extricating Mr. Blanchard from a nightclub. The trial judge found that Mr. Blanchard's attorney was entitled to attorney's fees and costs under 42 U.S.C. 1988.

The original submission by plaintiff's counsel was for attorney's fees in the amount of THIRTY SIX THOUSAND SEVEN HUNDRED EIGHTY AND NO/100 ($36,780.00) DOLLARS and out of pocket costs and expenses of FIVE THOUSAND FIVE HUNDRED ELE-

VEN AND 92/100 ($5,511.92) DOLLARS. The trial court found that using the "lodestar" method proscribed by this Court in *Hensley v. Eckerhart,* 103 Sup. Ct. 1933 (1983), plaintiff's counsel reasonably expended 97 hours and 20 minutes (96 hours by Mr. Rosen and 1 hour and 20 minutes by his associate Ms. Dombourian). The Court further found that a reasonable hourly rate for Mr. Rosen and Ms. Dombourian was $100.00 per hour. Upon arriving at a lodestar figure of NINE THOUSAND SEVEN HUNDRED TWENTY AND NO/100 ($9,720.00) DOLLARS, the trial court adjusted Mr. Rosen's attorney's fees bill downward to SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7,500.00) DOLLARS due to his abuse of "billing judgment", the elemental nature of the litigation, and the contingency fee arrangement which provided for attorney's fees in the amount of forty percent (40%) of any judgment collected. The District Court further found that the only costs recoverable would be those designated as costs under 28 U.S.C. 1920 and therefore awarded $886.92 in costs. A copy of the District Court's reasons for judgment may be found at Appendix Page 6A herein.

On appeal to the United States Court of Appeals, Fifth Circuit, the Judgment was modified to provide attorney's fees of FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS and expenses of FOUR THOUSAND FOUR HUNDRED NINETY NINE AND 52/100 ($4,499.52) DOLLARS. The Fifth Circuit limited the award of attorney's fees to forty percent (40%) of the judgment amount ($10,000.00) as was provided for in the contingency fee contract which had been entered into by plaintiff and his attorney. The Court held that under *Johnson v. Georgia Highway Express, Inc.,* 488 F. 2d 714,

718 (5th Cir. 1974), the appellant could not be given a windfall via Section 1988 and he should not be awarded a fee greater than he was contractually bound to pay. The appellate court then found that the District Court had erred in failing to award expenses for items incidental to the attorney's services such as photocopying, long distance telephone calls and travel and therefore modified the judgment to increase the costs award to FOUR THOUSAND FOUR HUNDRED NINETY NINE AND 52/100 ($4,499.52). From this judgment the Appellant seeks the issuance of a writ of certiorari.

—o—

ARTHUR BLANCHARD'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

ARGUMENT

The decision below is correct and does not conflict with the decision of this court in *City of Riverside, et al v. Rivera,* 106 Sup. Ct. 2686 (1986).

I. THE DECISION BELOW IS CORRECT

The Fifth Circuit in the case at bar, limited the plaintiff's attorney's fees to the amount which he had contracted to receive. Prior to the trial of the case, plaintiff entered into a contingency fee contract with his attorney which provided for a fee of forty percent (40%) of the damages awarded in the case. (Trial Court Ruling Appendix Page 14A). The attorney's fees cap imposed by the Fifth Circuit is mandated by *Johnson v. Georgia*

Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974). In *Johnson*, Supra, the Fifth Circuit held:

> "The fee quoted to the client or the percentage of the recovery agreed to is h.lpful in demonstrating the attorney's fee expectations when he accepted the case . . . In no event, however, should the litigant be awarded a fee greater than he in contractually bound to pay, if indeed the attorneys have contracted as to the amount."

Although *Johnson*, Supra, was reported prior to enactment of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, both the House and Senate reports accompanying Section 1988 expressly endorsed the method used in *Johnson*, id., to arrive at a reasonable attorney's fee. See S. Reports, No. 94-1011, pg. 6 (1976); H.R.Rep. No. 94-158 1558, pg. 8 (1976). U.S. Code Congressional and Administrative News 1976, pg. 5908. Guided by *Johnson*, the Fifth Circuit held, that if the plaintiff enters into a contract with his attorney to handle the case for a percentage of the damages recovered, and that percentage is reasonable, then the litigant should not receive a windfall via Section 1988.

As a result of the alleged use of excessive force, Blanchard claimed that he suffered physical damage which violated his Constitutional rights. Mr. Rosen was satisfied to handle the case on a forty percent (40%) contingency basis. At the time the contract was entered into, both the plaintiff and Mr. Rosen felt that the fee agreement was reasonable. Mr. Rosen was willing to take the case for a percentage of whatever damages were recovered, if any. Had Mr. Blanchard not been successful, Mr. Rosen would have received no attorney's fees which was

the chance that he agreed to take at the time he accepted the case.

As indicated by this Court in *City of Riverside v. Rivera*, 106 Sup. Ct. 2686 (1986) "Congress enacted Section 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See H. Rep. at 3. These victims ordinarily cannot afford to purchase legal services at the rate set by the private market. See id., at 1 ("because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"); S. Rep. at 2 U.S. Code Congressional and Administrative News 1976, pg. 5910." 42 U.S.C. 1988 and the case law interpreting it clearly provides that a prevailing party in a civil rights action is allowed reasonable attorney's fees for the successful prosecution of his claim. Certainly, Mr. Rosen could have entered into a contingency agreement with plaintiff whereby he would collect reasonable attorney's fees upon the successful prosecution of the plaintiff's claim by submitting an itemized statement of time and a reasonable hourly rate to the district court upon conclusion of the trial. Mr. Rosen, however, chose to enter into a contingency agreement with the plaintiff whereby he would receive forty percent (40%) of the damages recovered by the plaintiff. This Court must keep in mind that the particular civil rights violation before the court alleges physical damage from which the victim potentially could have recovered a large amount of damages had he been totally successful. By allowing an attorney to contract for a percentage of the damages recovered in cases where there is a potential to recover

large sums of damages, the court does not undermine Congress' purpose in enacting Section 1988. For those cases involving meritorious civil rights claims with relatively small potential damages, the attorneys can still enter into a contingency agreement and recover reasonable attorney's fees without agreeing to accept a percentage of the damages recovered. Certainly, the attorney handling the case is in the best position to make a determination as to whether he wants to risk time and expenses in order to receive a percentage of the damages recovered or a reasonable fee as set by the court at the conclusion of the trial. To allow an attorney to contract with his client for one price and require an unsuccessful defendant to pay more than the plaintiff is contractually bound to pay is patently unfair to the defendant.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN CITY OF RIVERSIDE V. RIVERA, 106 Sup. Ct. 2686 (1986)

This Court in *City of Riverside v. Rivera*, 106 Sup. Ct. 2686 (1986) held:

> "That a rule limiting attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting Section 1988."

In *City of Riverside*, Supra, this Court affirmed an attorney's fee award of $245,456.25 in a case wherein the plaintiff recovered $33,350.00 in compensatory and punitive damages. This Court indicated that although the amount of damages recovered is one factor which the court must look at at arriving at a reasonable fee, a rule

limiting attorney's fees to a proportion of the damages awarded would seriously undermine the purpose of Section 1988. The case at bar differs from *City of Riverside*, Supra, in that the attorneys in that case did not enter into a contingency fee agreement whereby they agreed to accept the case for a specified percentage of the damages recovered. By limiting the amount of attorney's fees recoverable to a proportion of the damages recovered, the Court would be undermining the purpose of Section 1988 which is to ensure that lawyers are willing to represent persons with legitimate civil rights grievances even though they may not be able to afford legal counsel. By accepting any particular civil rights case on a percentage of the damages recovered, an attorney is making a financially motivated decision as to the method of payment, i.e. a percentage of damages recovered as opposed to a reasonable fee set by the court. As very adequately set out by the Fifth Circuit in the case at bar, neither the appellant nor congress' purpose in enacting Section 1988 were disserved by not awarding a fee greater than the litigant was contractually bound to pay. The Fifth Circuit stated:

> "In reaching this conclusion, we disserve neither the appellant nor Congress' intention to foster enforcement of this civil rights act by means of fee shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may not decide to accept another civil rights case on a contingent fee contract, but the outcome of this case should not be disincentive to handling civil rights cases upon different contractual terms." *Blanchard v. Bergeron*, 831 F. 2d 563 (5th Cir. 1987) (reprinted in the appendix at pages 1A through 5A).

Had the jury in this case awarded $1,000,000.00 as opposed to $10,000.00, it is very unlikely that this case would be in its current posture. By limiting attorney's fees to a proportion of the damages awarded as provided for by "the contract" entered into by the parties, this court would not be reversing its previous decision in *City of Riverside v. Rivera,* 106 Sup. Ct. 2688 (1986) nor would it be undermining Congress' purpose in enacting Section 1988. The Court would, however, be preventing a "windfall" to civil rights attorneys.

CONCLUSION

For the reasons set out above, this court should deny the writ requested.

Respectfully submitted,

EDMOND L. GUIDRY, III
GUIDRY & GUIDRY
Attorneys at Law
324 South Main St.
St. Martinville, La. 70582
318/394-7116

Attorney for Respondents,
James Bergeron and Sheriff
Charles A. Fuselier

APPENDIX

APPENDIX 1

ARTHUR J. BLANCHARD,

Plaintiff-Appellant,

v.

James BERGERON, Sheriff Charles Fuselier, ABC Insurance Company, DEF Insurance Company, Barry Breaux, Oudrey Gros, Jr., Darrell Revere, Oudrey's Odyssey Lounge, GHI Insurance Company,

Defendants-Appellees.

No. 86-4832.

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1987.

Appeal was taken from judgment of the United States District Court for the Western District of Louisiana, Donald E. Walter, J., awarding attorney fees in civil rights action. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) successful civil rights plaintiff, who had entered into contingency agreement, was not entitled to recover total attorney fees of slightly over $40,000, and (2) expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award.

Affirmed as modified.

1. Civil Rights KEY 13.17(6)

Amount successful civil rights plaintiff is obligated to pay his attorney serves as cap on amount of attorney

fees to be awarded, although court is not bound to enforce contract for unreasonably high fee.

2. Civil Rights KEY 13.17(6)

Successful civil rights plaintiff, who had entered into contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded—in this case, $4,000—was limited to a fee award of $4,000, and could not be awarded $7,500 in attorneys fees.

3. Civil Rights KEY 13.17(8)

Expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award in civil rights case, where fee itself was limited by parties' agreement with no provisions for expenses, and items claimed represented customary out-of-pocket charges and were not unreasonable in amount.

William W. Rosen, New Orleans, La., for plaintiff-appellant.

Edmond L. Guidry, III, Martinville, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, GARZA, and JONES, Circuit Judges:

EDITH H. JONES, Circuit Judge:

This appeal deals only with the district court's attorney fee award under the Civil Rights Act after the jury

awarded appellant $5,000 compensatory and $5,000 punitive damages on his § 1983 claim. Although appellant sought total attorney fees and costs slightly over $40,000, the district court awarded $7,500 in attorney fees and $886.92 for costs and expenses. We reverse, because there is a controlling contingency fee agreement between the attorney and client.

The Supreme Court has instructed that the district court has discretion in determining the amount of a fee award. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). We will only overrule findings of fact which we find to be clearly erroneous, and the reasonableness of the total award will be judged accordingly to the abuse of discretion standard. *Curtin v. Bill Hanna Ford, Inc.,* 822 F.2d 549 (5th Cir. 1987).

FEES

The district court found that Appellant had a contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded—in this case, $40,000. While the record is not without doubt on this point, this factual finding is not clearly erroneous and is supported by deposition testimony of appellant's trial counsel. The district court applied this factual finding as one justification among several for adjusting the requested lodestar downward.

[1, 2] Appellant contends that a contingency fee agreement should be disregarded in determining a reasonable fee in civil rights cases. Several circuits have so held. *Hammer v. Rios,* 769 F.2d 1404, 1408 (9th Cir.1985); *Cooper v. Singer,* 719 F.2d 1496, 1500 (10th Cir.1983);

Lenard v. Argento, 699 F.2d 874, 900 (7th Cir.1983); *Sargeant v. Sharp,* 579 F.2d 645, 649 (1st Cir.1978). According to appellant, we should therefore ignore his contingency agreement and, overruling other aspects of the district court decision, award him a significantly higher amount. Appellant failed to cite our circuit's holding, by which we are bound that the amount a successful civil rights plaintiff is obligated to pay his attorney serves as a cap on the amount of attorney's fees to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 718 (5th Cir.1974). The reason enunciated for this limit is that an appellant will not be given a windfall via § 1988. "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay. . . ." *Id.* The Eleventh Circuit has also followed *Johnson,* reasoning that the contract between a plaintiff and his attorney represents their notion of a reasonable fee. *Pharr v. Housing Authority,* 704 F.2d 1216, 1218 (11th Cir.1983). In reaching this conclusion, we disserve neither the appellant nor Congress's intention to foster enforcement of the Civil Rights Act by means of fee-shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may decide not to accept another civil rights case on a contingent-fee contract, but the outcome of this case should not be a disincentive to handling civil rights cases upon different contractual terms. See, e.g., the contract in *Pharr,* supra. Finally, to the extent that fee awards in civil rights cases are intended to reflect fees charged "in the marketplace" for legal services, enforcement of the contingent fee contract here is appropriate.

Because the fee award must be limited to $4,000, we need not address Appellant's claims that the district court improperly reduced the number of hours in the lodestar calculation. Moreover, any hours "billed" by law clerks or paralegals would also naturally be included within the contingency fee.

EXPENSES

[3] Appellant argues that the district court erred in not awarding expenses for items incident to the attorney services such as photocopying, long distance telephone calls and travel. The district court held that such expenses represent overhead which is compensated for by the attorney fee, rendering additional compensation unwarranted. Where, however, the fee itself has been limited by the parties' agreement with no provision for expenses, Section 1988 may be employed to permit such an award. The items claimed by appellant represent customary out-of-pocket charges in this type of litigation and are not unreasonable in amount. To these, we must add the costs of depositions, which the district court denied, but which fall within Fed.R.Civ.Proc. 54(d). *See Allen v. U.S. Steel Corp.,* 665 F.2d 689, 697 (5th Cir.1982).

Thus, the judgment of the district court is modified to provide attorney fees of $4,000 and expenses of $4,499.52.

AFFIRMED AS MODIFIED.

WEST KEY NUMBER SYSTEM

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

F I L E D
OCT 23 1986

ROBERT H. SHEMWELL, CLERK

BY s/s d d
DEPUTY

(stamp)

JUDGMENT ON ATTORNEY'S FEES AND COSTS

Pursuant to the foregoing Ruling,

IT IS ORDERED, ADJUDGED and DECREED that plaintiff shall recover the reasonable attorney's fee of $7,500.00; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff shall recover as reasonable costs and expenses the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana, this 23rd day of October, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRIT JUDGE

Judgment Entered 10-24-86

By s/s gd
Copy To Rosen
Guidry
Gibbens
Computer

(stamp)

ATTEST: A TRUE COPY

DATE October 24, 1986

ROBERT H. SHEMWELL, CLERK

BY s/s Sandra J. Dean
Deputy Clerk, U.S. District Court
Western District of Louisiana

(stamp)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL
U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

F I L E D
OCT 23 1986

ROBERT H. SHEMWELL, CLERK

BY s/s d d
DEPUTY

(stamp)

R U L I N G

Following trial of this action brought pursuant to 42 U.S.C. § 1983, plaintiff was awarded compensatory and punitive damages totaling $10,000.[1] Now, plaintiff has moved for an award of attorney's fees, costs and expenses in accord with the judgment entered June 3, 1986. The prevailing litigant in a civil rights action ordinarily is entitled to recover attorney's fees. *Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981). Pursuant to 42 U.S.C. § 1988, which provides in pertinent part,

> "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 [of Title 42], . . . the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs,"

this award is left to the sound discretion of the trial court. *Id.* Here, plaintiff is a prevailing party within the meaning of this part.[2] The Court must now go about the task of determining the amount of the award.[3]

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1. Of the total judgment, defendants, James Bergeron and Charles Tuselier in his official capacity as Sheriff and Audrey's Odyssey Lounge were liable in solido for compensatory damages totaling $5,000, 90 percent and 10 percent respectively. Plaintiff's § 1983 claim was dismissed against Tuselier, thus resulting in judgement under § 1983 only against Bergeron. In keeping with this determination, the punitive damage award of $5,000 is only against Bergeron.

2. § 1988, by its terms, permits an award of attorney's fees only to a "prevailing party." *Taylor*, 640 F.2d at 669. In determining prevailing party status, the focus is "not on the form of the final judgement but on the substance of the relief." *Tasby v. Wright*, 550 F.Supp. 262, 271 (N.D. Tx. 1982).

3. The circuit employs the "lodestar" method of determining such amount. *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir.

(Continued on following page)

The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1937 (1983). As noted by the Supreme Court in *Riverside v. Rivera*, slip op. no.85-224 (June 27, 1986), the congressional intent for enacting this provision was to allow plaintiffs to enforce civil rights laws, especially under the adverse circumstances of an unpopular cause or where the amount of damages at stake would not otherwise make it feasible for them to do so.[4] *Id.* at 15. The expressed purposes of this provision are met in the present matter; nevertheless, § 1983 was not intended to be a windfall for attorneys, for it is only "reasonable" fees that are recoverable.

A fee applicant must exercise "billing judgment" with respect to the number of hours for which he seeks com-

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(Continued from previous page)

1983). The Court must articulate the basis for its award of attorney's fees, thus insuring meaningful appellate review of its discretion. *Harkless v. Sweeny Independent School District*, 608 F.2d 594, 596 (5th Cir. 1979). A meaningless exercise in parroting *Johnson's* criteria is not required *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974); instead, this analysis is to assure that the Court has arrived at a just compensation based on appropriate standards. *Tasby*, 550 F.Supp. at 275.

4. Quoting the Senate Reports, the Supreme Court noted, "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the National's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *See* S.Rep. No. 94-1011, p. 2 (1976) (hereafter Senate Report). *Rivera*, slip op. at 15.

pensation to ensure reasonableness.[5] *Rivera,* slip op. at 7 n. 4. "Billing judgment" excludes from a fee request "excessive, redundant, or otherwise unnecessary" hours. *Id.* Moreover, the applicant bears the burden of presenting an adequate accounting of his time to allow the court to make this determination, failing such, the claim for fees shall be denied.[6] *Hensley,* 103 S.Ct. at 1941 and n. 12. In this matter, plaintiff's records are often inadequate and difficult to decipher. Many of his time sheets fail to inform the Court of how the time billed was spent; these vague claims are, therefore, Denied. However, the Court can evaluate some of the billed hours, for which recovery will be allowed.

---

5. "*Hensley* requires a fee applicant to exercise 'billing judgment' not because he should necessarily be compensatd for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be reasonable. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." *Id.* at 424.

6. The applicant must submit a full and accurate accounting of his time; the accounting must be based on contemporaneous records; and the accounting must give specifics such as the dates and nature of the work performed. *Hensley,* 103 S.Ct. at 1938, 1940. The record should be sufficiently detailed to enable the Court to determine what time was spent on different claims; it must also be detailed enough to enable the Court to determine if plaintiff's attorney is claiming compensation for hours that are redundant, excessive, or otherwise unnecessary, and to determine if the attorney has exercised "billing judgment" in submitting the fee application. *Id.* at 1938-41. Counsel should at least identify the general subject matter of his time expenditures, which plaintiff has repeatedly failed to do. *See Nadeau v. Helgemore,* 581 F.2d 275, 279 (1st Cir. 1978), "('As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims')."

Recognizing that prevailing parties in civil rights actions should ordinarily recover attorney's fees under § 1988 unless special circumstances would render such an award unjust, defendant contends the case at bar is one entailing such special circumstances. Defendant argues that plaintiff did not exercise "billing judgment" in submitting his fee request and, thus, should be denied recovery. The Court agrees that billing judgment was abused in this matter, where plaintiff claimed $42,291.92 in fees. Plaintiff did not limit his request to striking redundant or unnecessary hours. For this simple § 1983 action, plaintiff has submitted a request for an award of attorney's fees that represents in excess of 385 hours—for counsel, two co-counsel, paralegals and law clerks. This application is unreasonable, but it does not fit within one of the recognized exceptions barring recovery.[7] However, the Court will consider this abuse of "billing judgment" in adjusting the award after the "lodestar" is calculated.

---

7. The Fifth Circuit has recognized such special circumstances as would render an award under § 1988 unjust. *Taylor,* 640 F.2d at 668. Nevertheless, § 1988 requires a strong showing of special circumstances to justify denying an award of attorney's fees and costs to the prevailing party in a § 1983 claim. *Riddell v. National Democratic Party,* 624 F.2d 539, 543 (5th Cir. 1980). Arising only in unusual situations, special circumstances sufficient to deny an award of attorney's fees include a plaintiff's § 1983 claim which was essentially a tort claim for private monetary damages and an action where plaintiff's complaint was not instrumental in remedying a civil rights violation. *Id.* at 544-45. Also, the district court in *Clay v. Harris,* 583 F.Supp. 1314 (N.D. Ind. 1984), recognized another special circumstance for denying relief under § 1988 where a plaintiff prevailed but an award of attorney's fees would encourage numerous trivial lawsuits. Despite these exceptions, the jury clearly held that plaintiff's claim fell under the Constitution and § 1983. The Court holds the above special circumstances are not applicable to the case at bar.

The Supreme Court in *Hensley,* 103 S.Ct. 1933, announced certain guidelines for calculating a reasonable attorney's fee. *Hensley* stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 1939. This figure, commonly referred to as the "lodestar," is the starting point in calculating a reasonable fee as contemplated by § 1988. *Rivera,* at 5. In reaching this "lodestar," the Supreme Court cautioned that "[t]he district court . . . should exclude from this initial fee calculation hours that were not reasonably expended" on the litigation. *Hensley,* 103 S.Ct. at 1939-40.

In addition to those hours already excluded as unidentifiable, the Court also excludes hours billed in relation to a pendent state claim. Time spent researching issues concerning this claim which are distinguishable from his § 1983 are not recoverable.[8] Hours devoted specifically to this claim did not aid the outcome of the § 1983 action and are not reasonable within the meaning of § 1988.

To further aid the Court in making this assessment, the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), identifies twelve (12) factors to be considered in calculating a reasonable attorney's fee.[9] Here, neither the facts of this case nor the issues of law were novel or complex. Plaintiff's counsel rendered satisfactory service, but this was not a case of "exceptionable success." The case was filed in 1983, came to trial in 1986, and required less than three (3) days of trial. Motion practice in the course of the litigation was minimal. Preclusion of other employment should have been non-existent; time limitations were not a problem in this litigation. Of the hours claimed by plaintiff, the Court, after the above exclusions, will allow recovery for only 97 hours and 20 minutes—96 hours by Mr. Rosen and 1 hour and 20 minutes by co-counsel, Ms. Dombourian.

---

8. Claims for time spent researching Louisiana damages and pendent jurisdiction did not aid the prosecution of plaintiff's § 1983 claim.

9. While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying § 1988 expressly endorse the analysis set forth in *Johnson,*

(Continued on following page)

Calculation of the "lodestar" also involves the determination of a reasonable hourly rate. Plaintiff claims an hourly rate ranging from $100 through $150 per hour depending on senority—$150/hr. for 96 hours and $125/hr. for 1 hour and 20 minutes. Defendant argues these rates are unreasonable, suggesting a rate between $65 and $100 per hour. Taking notice of the customary fees in the community, the Court agrees that plaintiff's rates are high and holds that $100/hour is a reasonable rate.

After determining the "lodestar," which is presumed to be the reasonable fee contemplated by § 1988, *Rivera,*

(Continued from previous page)

supra. *Rivera* at 5. See Senate Report, p. 6; H.R. Rep. No. 94-1558, p. 8 (1976) (hereafter House Report). "These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d, at 717-719."

at 5, the *Hensley* court suggested other considerations that might lead the district court to adjust the lodestar figure upward or downward. *Id.* at 1939-40. Here, as noted earlier, plaintiff's abuse of "billing judgment" requires that the lodestar figure be adjusted downward. Further supporting this reduction is the elemental nature of this litigation and the contingency fee arrangement entered in this matter.[10] The lodestar of $9,720 is adjusted downward to $7,500.00.

There is also the question of costs which has yet to be determined. Plaintiff contends it is entitled to recover as costs photocopying expenses, travel expenses, mailing expenses, expert witness fees, deposition costs, paralegal and law clerk expenses. Defendant opposes this argument, suggesting only those costs specifically enumerated in 28 U.S.C. § 1920 or other statutes are recoverable. The Court agrees with defendants.

Following the recent Fifth Circuit opinion of *IWA v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986), § 1988 provides only for the recovery of attorney's fees by the prevailing party but does not include other expenses and cost of the litigation. *Id.* Even though the specific holding of *IWA, supra,* only concerned expert witness fees, the Court suggests a much more sweeping effect. *Id.* Noting the broad expanse of *IWA, supra,* this Court holds only those items recoverable as costs under

10. The contingency fee arrangement provided for 40 percent of whatever is collected—$4,000. Plaintiff's counsel will not be given a windfall via § 1988.

§ 1920[11] or other specific statutes are reasonable. Other costs are not recoverable.[12]

In light of the strong dissent by Judge Rubin in *IWA*, 790 F.2d at 1181, the Court also concludes the recovery of costs other than the ordinary witness fees and docket fees would be unreasonable under § 1988 and *Johnson, supra.* As to photocopying expenses, counsel have already been paid for preparing the memorandum or for researching the case that is being duplicated or the deposition copied. Similarly, travel costs, mailing costs and long-distance expenses amount to the recovery of the type of expenses usually associated with the practice of law and covered overhead expenses. Noting the simplicity of this matter, paralegal and law clerk fees were not necessitated so as to be reasonable. Whether excluded under *IWA, supra,* or by a reasonableness determination, items for costs and expenses are limited to those specifically enumerated. Of the $5,511.92 claimed by plaintiff, counsel may recover costs and expenses in the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana this 23d day of October, 1986.

11. § 1920 provides, "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

12. Necessarily included within this exclusion are expenses for paralegals, secretaries and other support personnel.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:

DATE 10-23-86
BY d d

TO: Rosen
Guidry III
Gibbins

(stamp)

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

FILED
MAY 30 1986

ROBERT H. SHEMWELL, CLERK
BY d d
DEPUTY

(stamp)

JUDGMENT

After trial before the Court and a jury, commencing on May 20, 1986, and concluding on May 22, 1986, Honorable Donald E. Walter, District Judge, presiding, and the Court having instructed the jury to find a general verdict and to answer special interrogatories, and the jury having rendered a verdict and answered these interrogatories, which have been filed in the record;

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff, Arthur Blanchard, recover compensatory damages from defendants, James Bergeron and Charles Fuselier in his official capacity as Sheriff of St. Martin

Parish liable for ninety percent (90%), and Oudrey's Odyssey Lounge liable for ten percent (10%), in the amount of Five Thousand and No/100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date this action was filed;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff recover punitive damages from defendant, James Bergeron, in the amount of Five Thousand and No/100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date judgment is entered;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's 42 U.S.C. § 1983 claim against defendant Charles Fuselier is Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's state law claims against defendants, Oudrey Gros, Jr., and Darrell Revere, are Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendant, James Bergeron, reasonable attorney fees to be later fixed by the Court; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendants, James Bergeron and Charles Fuselier in his official capacity, and Oudrey's Odyssey Lounge, reasonable costs to be later fixed by the Court.

JUDGMENT READ and SIGNED in Monroe, Louisiana, this 30th day of May, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Judgment Entered 6-3-86
By L J Sprott
Copy To _____

_____

_____

(stamp)

APPENDIX 4

42 U.S.C. § 1988.

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (As amended October 21, 1980, P.L. 96-481, Title II, § 205(c), 94 Stat. 2330.)

(3)

No. 87-1485

In The

Supreme Court of the United States

October Term, 1988

ARTHUR J. BLANCHARD,

Petitioner,

v.

JAMES BERGERON, SHERIFF CHARLES FUSELIER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, BARRY BREAUX, OUDREY GROS, JR., DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE, GHI INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

WILLIAM W. ROSEN*
ATTORNEY AT LAW
820 O'Keefe Avenue
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Telephone: (504) 581-4892

CHARLES J. PISANO
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* *Attorney of Record for Petitioner Arthur J. Blanchard*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

After a successful civil rights trial under 42 U.S.C. §§ 1983 and 1988, compensatory and punitive damages were awarded to the Plaintiff, Arthur J. Blanchard. Counsel, under § 1988, made application for an attorney's fee with all supporting documents. The district court awarded a fee of SEVENTY-FIVE HUNDRED ($7,500.00) DOLLARS. Costs and expenses were awarded in the amount of $886.92. Counsel considered both amounts insufficient for the time and effort involved. An appeal was taken to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, by Judgment rendered November 10, 1987, lowered counsel's fee to $4,000.00 holding that there was a contingent fee agreement and the agreement served as a "cap" on the amount of attorney's fee recoverable. In adhering to that theory, the Court did not consider nor did it include as a part of the fee the time spent by and valuable services of paralegals and law clerks.

The questions presented, therefore, are:

1. Does an agreement between the client and his counsel serve as a "cap" to limit the award of attorney's fees under the Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. § 1988)?

2. Should the time of paralegals and law clerks be considered in the award of a reasonable attorney's fee under 42 U.S.C. § 1988?

Within the scope of question 1 are the correlative issues of (a) an award of a fee for the time devoted to the fee application and (b) the reasonableness of the time and hourly rate requested.

LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

The actual parties at interest in this proceeding are James Bergeron (former Deputy Sheriff), Sheriff Charles Fuselier, (Sheriff of St. Martin Parish, Louisiana), American Druggist Insurance Company (in Liquidation), and the Louisiana Insurance Guarantee Association. All interests are represented through one attorney, Mr. Edmond L. Guidry, III, Attorney at Law, Guidry & Guidry, 324 S. Main Street, St. Martinville, Louisiana 70582. There are no other parties at interest in the present proceeding despite their appearance in the original title.

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N.B.: Counsel for Petitioner and Respondent agree that an appendix, other than that included in the Petition for Writ of Certiorari is unnecessary. Accordingly, a separate Joint Appendix has not been developed. A Motion for Leave To Dispense With Filing A Joint Appendix has been submitted to the Court. Supreme Court Rule 30.1.

No. 87-1485

In The

Supreme Court of the United States

October Term, 1988

ARTHUR J. BLANCHARD

Petitioner,

v.

JAMES BERGERON, SHERIFF CHARLES FUSELIER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, BARRY BREAUX, OUDREY GROS, JR., DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE, GHI INSURANCE COMPANY,

Respondents.

BRIEF ON BEHALF OF PETITIONER ARTHUR J. BLANCHARD

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on November 10, 1987, and is reported at 831 F.2d 563 (5th Cir. 1987); it is reprinted in the Certiorari Appendix at pages 1A - 5A.

There are two opinions from the United States District Court for the Western District of Louisiana. They are:

A. On Attorney's fees and costs: Judgment from the Monroe Division entered October 23, 1986 (Certiorari Appendix pages 6A through 16A).

B. The original Judgment on the jury verdict from the Lafayette Division entered May 30, 1986 (Certiorari Appendix page 17A through 18A).

JURISDICTION

The Supreme Court of the United States granted Arthur Blanchard's Petition for Writ of Certiorari on June 27, 1988, to review the judgment of the United States Court of Appeals for the Fifth Circuit. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The original statutes under which this matter was brought before the United States District Court were 42 U.S.C. § 1983 and § 1988.

This application for fees is brought under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (Certiorari Appendix page 20A).

STATEMENT OF THE CASE

This Civil Rights case was originally filed in the United States District Court for the Western District of Louisiana (Lafayette Division) under 42 U.S.C. §§ 1983 and 1988. After a jury trial, it was found that the Plaintiff, ARTHUR J. BLANCHARD, had been assaulted without justification by Deputy Sheriff James Bergeron, a member of the Sheriff's Office of St. Martin Parish, Louisiana. The

assault took place in Oudrey's Odyssey Lounge. The Lounge, its owners and insurer were joined under pendent jurisdiction. In the beating, Mr. Blanchard suffered a broken jaw and other lesser injuries. The judgment based upon the verdict awarded Mr. Blanchard $5,000 compensatory damages and $5,000 punitive damages. (Cert. Appendix 17A).

After entry of the Judgment on the verdict, counsel for Arthur Blanchard submitted detailed time, cost, and expense records to support his application for an attorney's fee and costs under 42 U.S.C. § 1988. (R.* 84-85) Counsel's deposition was taken by opposing counsel. (R., *supra*, Exhibit A) The fee application included substantial time of paralegals and law clerks. The original fee request included time for a variety of services including investigation, depositions, pleadings, preparation and three trial days of the civil rights case; for the fee application, time was devoted to the file and time review, legal research, memorandum, counsel's deposition, etc. The total original fee requested was $36,780.00. Out-of-pocket costs and expenses amounted to $5,511.92. Of those amounts, the District Court awarded an attorney's fee of $7,500.00 plus costs and expenses in the amount of $886.92. Counsel appealed to the Court of Appeals for the Fifth Circuit. (R. 90).

As of the time shortly prior to the submission of the brief to the Fifth Circuit (but not including services or time for the research, writing, and submission of a reply brief, preparation for oral argument or presentation of

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* Record docket entry number

the case) counsel increased the total fee requested to $42,699.30. Costs increased by $329.32 for a total of $5,841.24.

The Court of Appeals, by Judgment dated November 10, 1987, decreed that the Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974) " . . . by which we are bound," required that a contingent fee contract " . . . serves as a cap on the amount of the attorney's fee to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee." *Blanchard v. Bergeron*, et al, 831 F.2d 563, 564 (5th Cir. 1987).

The Fifth Circuit refused to allow the recovery of any law clerk or paralegal fees because their time would " . . . naturally be included within the contingency fee." Further, the Court of Appeals did not award a fee for the time spent on the attorney's fee application.

A Petition for Writ of Certiorari was submitted to the Supreme Court of the United States. It was granted on June 27, 1988.

SUMMARY OF ARGUMENT

The Fifth Circuit's *Blanchard* holding conflicts with prior decisions of the Supreme Court and of every federal circuit including the Fifth. The *Blanchard* court held that a contingent fee contract set a cap on the amount of fee an attorney could recover under the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988. Setting a contingent fee cap is contrary to the clear indication in *City of*

Riverside v. Rivera, infra, which rejected the setting of fees as a proportion of a damage award.

As part of counsel's fee application in the trial court, a substantial amount of time was submitted for work performed by law clerks and paralegals. The trial court rejected all of it. The Fifth Circuit did not address the issue, holding that the contingency included all time and services provided. The Supreme Court allowed legal assistants' time as part of an attorney's fee in *City of Riverside*, and many circuits, including the Fifth, have specifically made the time of law clerks and paralegals part of the civil rights attorney's fee recovery. The current, ethical, fiscally conservative practice of law requires specific confirmation by the highest Court that the valuable services of these legal assistants shall be recoverable.

The *Blanchard* decision is confusing because it does not direct, even under its "cap" theory, whether the "contingent" fee is to be paid *from* the amount recovered by the successful plaintiff or *by* the condemned defendant. The former would defeat the purpose of all of the civil rights and "private attorneys general" laws passed by Congress. Factually, the Fifth Circuit is in error in suggesting that the *Blanchard* holding prevents a windfall. The correctly applied standards of "lodestar" do not result in, but are intended to prevent a windfall either to the successful civil rights litigant or to his attorney.

Attorney's fees have traditionally been awarded to counsel for the time spent on efforts to recover a fee. Neither the trial court nor the Fifth Circuit considered or awarded any amount for the considerable time devoted to that effort.

Argument will be presented under the following headings:

I. *Blanchard* Conflicts With Rulings Of The Supreme Court of the United States.

II. *Blanchard* (Fifth Circuit) Conflicts With All Other Circuit Courts.

III. *Blanchard* Is Contrary To Decisions Within The Fifth Circuit.

IV. *Blanchard* Fails To Include The Time of Law Clerks and Paralegals as Part of the Attorney's Fee.

V. Factual and Procedural Confusion in *Blanchard*.

VI. Attorney's Fees Should Be Awarded For Time Devoted To The Fee Application.

VII. Fees and Time Claimed.

ARGUMENT

I. BLANCHARD CONFLICTS WITH RULINGS OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit's decision in *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987), appears to conflict with the ruling of this Court in *City of Riverside, et al v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed. 2d 466 (1986). In that case, the Supreme Court stated that:

"We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *Id.* at 2694.

"A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988." *Id.* at 2695.

"A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with the Congress' purpose in enacting § 1988." Id. at 2696.

" . . . [W]e find no evidence that Congress intended that, in order to avoid 'windfalls to attorneys,' attorney's fees be proportionate to the amount of damages a civil rights plaintiff may recover." *Id.* at 2697.

"In the absence of any indication that Congress intended to adopt a strict rule that attorney's fees under § 1988 be proportionate to damages recovered, we decline to adopt such a rule ourselves." *Id.* at 2698.

It is difficult to understand how this Court's language could refer to anything other than a contingent fee arrangement when it refused to limit § 1988 fees to a proportion of damages. *City of Riverside* specifically rejected an *amicus curiae* suggestion that civil rights fees be "modeled upon the contingent fee arrangements." *Id.* at 2694.

> "Moreover, the contingent fee arrangments that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *Id.* at 2696.

The *Blanchard* court also could have consulted *Pennsylvania v. Delaware Valley Citizens' Council*, ___ U.S. ___, 107 S. Ct. 3078 (1987), for guidance. After discussing the

Johnson case, the Court observed that, " 'In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee paying client, for all time reasonably expended on a matter (citation omitted)' S. Rep. 6, U.S. Code Cong. & Admin. News 1976, p. 5913." *Id.* at 3086 See also *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), especially footnotes 3 and 4, pages 1937 and 1938, noting and applying the *twelve* factors of *Johnson v. Georgia Highway Express, Inc., supra.*

Blanchard v. Bergeron, et al, should be reversed because it failed to follow the clear direction of the Supreme Court of the United States that a contingency fee agreement is not the only criteria in setting the attorney's fee for a successful § 1988 plaintiff.

II. *BLANCHARD* (FIFTH CIRCUIT) CONFLICTS WITH ALL OTHER CIRCUITS

The Fifth Circuit *Blanchard* decision is in conflict with every other circuit of the United States. All other circuits now subscribe to the lodestar method of computing attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976. At a minimum, the lodestar approach is the beginning point. Many circuits have subscribed to the 12 factors set out by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc., supra* at 717-719, but none adhere to a rigid standard that a contingent fee agreement sets an upper limit on recovery of civil rights attorney's fees. The *Blanchard* opinion stated that the Fifth Circuit was "bound" by *Johnson* to set the

cap, apparently referring to dictum[1] in that 1974 case decided before the Civil Rights Attorney's Fee Award Act of 1976.

The circuit opinions which are contrary to the holding of the Fifth Circuit *Blanchard* decision are:

The First Circuit: *Wojtkowski v. Cade*, 725 F.2d 127 (lst Cir. 1984); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (lst Cir. 1985); *Sargeant v. Sharp*, 579 F.2d 645 (lst Cir. 1978) [" . . . [W]e reiterate that a fee arrangement is irrelevant to the issue of entitlement and should not enter into the determination of the amount of a reasonable fee." *Id.* at 649.]; *Hall v. Ochs*, 817 F.2d 920 (lst Cir. 1987).

Second Circuit: *Lewis v. Coughlin*, 801 F.2d 570 (2d Cir. 1986) {"Contingency is but one of twelve factors which the Supreme Court has said should be considered in fixing a reasonable attorney's fee" *Id.* at 575, citing *City of Riverside v. Rivera, supra*]; *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982); *Dominic v. Consolidated Edison Co. of N.Y., Inc.*, 822 F.2d 1249, 1259 (2d Cir. 1987).

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1 "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." *Johnson, supra* at 718. However: " . . . Judge Holloway noted that problems arise in applying the *Johnson* dictum . . . ." *Cooper v. Singer*, 719 F.2d 1496, 1500, note 6 (10th Cir. 1983), and "*Johnson* was a civil rights case decided before the enactment of the Civil Rights Attorney's Fee Award Act 42 U.S.C. § 1988 (1976), and thus is inapplicable." *Fleet Investment Co, Inc., v. Rogers*, 620 F.2d 792, 793, note 1 (10th Cir. 1980).

Third Circuit: *Sullivan v. Crown Paperboard Co., Inc.*, 719 F.2d 667 (3d Cir. 1983) ["At its clearest, the legislative mandate would therefore have courts consider the existence of contingency arrangements, while not allowing such consideration to thwart the enforcement of the substantive statutory rights that gave rise to the fee award provision." *Id.* at 669]; *Durett v. Cohen*, 790 F.2d 360 (3d Cir. 1986).

Fourth Circuit: *Vaughns v. Board of Education of Prince George's County*, 770 F.2d 1244 (4th Cir. 1985); *Harrington v. Empire Const. Co.*, 167 F.2d 389 (4th Cir. 1948).

Sixth Circuit: *United Slate Tile & Composition Roofers et al v. G. & M. Roofing and Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984) ["The existence of a contingency contract may be considered by the District Court as an element to be considered in determining the market value of an attorney's services, but the Court is not bound in any sense by that agreement." *Id.* at 504.]

Seventh Circuit: *Lenard v. Village of Melrose Park*, 699 F.2d 874 (7th Cir. 1983) ["The trial court may consider as a factor the contingent fee contract, but it is not to be an automatic limit on the attorney fee award." *Id.* at 899]; *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982); *Hagge v. Bauer*, 827 F.2d 101 (7th Cir. 1987) ["If we were to read the district court's 'straight contingency fee analysis' to suggest that the contingency rate is *per se* reasonable, we would reverse because of the Supreme Court's emphasis on lodestar amounts in *City of Riverside v. Rivera* (citation omitted)" *Id.* at 111.]

Eighth Circuit: *Sisco v. J. S. Alberici Construction Co., Inc.*, 733 F.2d 55 (8th Cir. 1984) ["We hold that a percentage fixed in a contingent-fee contract is not an absolute ceiling on fee awards. We reverse and remand for a

determination by the District Court of a proper fee award in this case." *Id.* at 56. "These effects [[limitation of fee to a contingent fee contract]] would run counter to the intention of Congress to encourage successful, civil-rights litigation" *Id.* at 57.]

Ninth Circuit: *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) [" . . . Section 1988 authorizes the award of a reasonable fee not necessarily limited to the fee agreed upon by the parties." *Id.* at 1408.]; *Manhart v. City of Los Angeles Dept. or Water and Power*, 652 F.2d 904 (9th Cir. 1981) ["The statute [[Title VII, 42 U.S.C. § 2000e-5(k), Section 706(k)]] authorizes payment of a reasonable fee, not the fee agreed upon by the parties and their attorneys. The fee agreed upon is therefore not decisive. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974); *Clark v. American Marine Corp.*, 320 F.Supp 709-711 (E.D. La. 1970), *aff'd* 437 F.2d 959 (5th Cir. 1971)." *Id.* at 909.]

Tenth Circuit: *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) ["We therefore conclude that a section 1988 fee award should not be limited by a contingent fee agreement between the attorney and his client." *Id.* at 1503 (this is an excellent analysis of Section 1988 awards)]; *Fleet Investment Co., Inc. v. Rogers*, 620 F.2d 792 (10th Cir. 1980) [The limitation of fees in civil rights cases to a contingent fee contract " . . . would obviously frustrate the intent of Congress and we refuse to adopt such a rule." *Id.* at 793.]

Eleventh Circuit: The Fifth Circuit opinion in *Blanchard* cites the Eleventh Circuit case of *Pharr v. Housing Authority of City of Pritchard, Alabama*, 704 F.2d 1216

(11th Cir. *1983*) as support for its ruling that a contingent fee contract sets the upper limit in a § 1988 fee case. The Fifth Circuit could have better examined the more timely ruling in *Tic-X-Press, Inc. v. Omni Promotions Company of Georgia,* 815 F.2d 1407 (11th Cir. *1987*) in which that argument was rejected with the Court declaring, " . . . the District Court decided to determine a 'reasonable' fee by applying the twelve factors articulated in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974), without regard to a contingency fee agreement. Accordingly, the Court analyzed TXP's fee request in light of the *Johnson* guidelines and calculated the plaintiff's lodestar at $118,545.00 concluding that the hours expended and rates charged were reasonable." *Id.* at 1423. See also *Walters v. City of Atlanta,* 803 F.2d 1135 (11th Cir. *1986*), in which paralegal time was added to attorney time and the contingent fee agreement was "enhanced" by 35%. See also *Watford v. Heckler,* 765 F.2d 1562 (11th Cir. 1985), stating, "However, in assigning weight to other factors '[n]o one *Johnson* criterion should be stressed to the neglect of others' [citation omitted]. Although the amount involved is generally a factor to be considered, a fee award may not be limited to a 'modest proportion of the total monetary recovery' or even to 'the [total] amount recovered' " [citations omitted] *Id.* at 1569.

District of Columbia Circuit: *Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4 (D.C. Cir. 1984); *cert. denied* 472 U.S. 1021, 1055 S.Ct. 3488 [supporting lodestar, the Court said, "The fee award must be recalculated according to the market rates established by those firms in their everyday practice." *Id.* at 30. The Court does not state whether or not there was a contingency fee contract. It refused to

approve a "contingency multiplier" and found no ground for a "contingency enhancer", both of which had been added to the lodestar calculation by the trial court.]; *Copeland v. Marshall,* 641 F.2d 880 (D.C. Cir. *en banc,* 1980) ["Contingency adjustments . . . are entirely unrelated to the 'contingent fee' arrangements that are typical in plaintiffs' tort representation." "The contingency adjustment is a percentage increase in the 'lodestar' to reflect the risk that no fee will be obtained" *Id.* at 893.]

The national policy question to be reviewed in the *Blanchard* case is broader than the *Blanchard* facts. It is respectfully suggested that if this Fifth Circuit opinion is allowed to stand, it may serve to deny successful civil rights attorneys a fee in such varied situations as (1) civil rights injunction proceedings, (2) the attorney and client have a contingent fee agreement contract but the client becomes bankrupt, [all funds could be held by the trustee], or (3) the client is or becomes incompetent and the validity of the contract is in question. A clear, national interpretation will serve to encourage participation by competent counsel who can rely upon a Supreme Court decision to insure an award of a reasonable fee in these highly contested civil right matters. It will enhance the intent of Congress in all of the civil rights statutes.

III. *BLANCHARD* IS CONTRARY TO DECISIONS WITHIN THE FIFTH CIRCUIT

In deciding *Blanchard*, the Fifth Circuit failed to follow its own recent rulings.

The Fifth Circuit chided counsel for not citing the 1974 *Johnson* case, and went on to base the *Blanchard*

limitation of fee squarely upon its ruling in *Johnson* which predated 42 U.S.C. § 1988. However, counsel extensively cited the Fifth Circuit's more recent ruling in *Copper Liquor, Inc. v. Adolph Coors, Co.*, (citations *infra*). The *Copper Liquor, Inc.* case was brought before the Fifth Circuit four times: *Copper Liquor* I, 506 F.2d 934 (5th Cir. 1975), *Copper Liquor* II, 624 F.2d 575 (5th Cir. 1980), *Copper Liquor* III, 684 F.2d 1087 (5th Cir. 1982) [overruled on the limited issue of expert fees as cost of court, *Gibbons v. Crawford Fitting Company*, 790 F.2d 1193 (5th Cir. 1986)] and *Copper Liquor* IV, 701 2d 542 (5th Cir. 1983). Cases II and III dealt with attorney's fees.

The following are quotations from *Copper Liquor* II:

> "We have encouraged district courts to apply the *Johnson* test flexibly in computing attorney's fees." *Copper Liquor* II, *supra* at 583.
>
> "Although all of the *Johnson* factors must be considered, recent decisions of this Court suggest that District Courts, in computing attorney's fees, should pay special heed to *Johnson* criteria numbers (1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation and ability of counsel." *Id.* [Particular note should be made that *Johnson* criteria number 6 deals with contingent contract considerations and is *not* among those listed to which "special heed" should be paid.]

Copper Liquor II reversed the district judge's award of an attorney's fee and remanded the issue for reconsideration. After a new fee award was made, the issue returned to the Fifth Circuit. Again noting with approval that special heed should be paid only to *Johnson* factors numbers 1, 5, 8, & 9, *Copper Liquor* III stated:

> " 'Whether the fee is fixed or contingent is one of the *Johnson* factors that the district judge must consider in calculating the reasonable attorneys' fees, but a 'district court is not bound . . . by the agreement of [counsel with his client] as to the amount of attorneys' fees.' *Copper Liquor* II, 624 F.2d at 583 n. 14." *Copper Liquor* III, *supra* at 1097.

The cited note 14 from *Copper Liquor* II reads:

> "A district court is not bound by, and may not merely ratify, the agreement of the parties as to the amount of attorneys' fees. *Piambino v. Bailey*, 5 Cir. 1980, 610 F.2d 1306, 1328."

In 1983, in *Riddell v. National Democratic Party*, 712 F.2d 165 (5th Cir. 1983), the Fifth Circuit found the lodestar method to be appropriate for calculating attorneys' fees. The court directed trial judges to " . . . articulate fully the reasons for their awards, including an indication of how the *twelve Johnson* factors affected the decision." [citing *Copper Liquor* II and III] *Id.* at 170 (emphasis on "twelve" supplied).

Patently, it was error for the Fifth Circuit to ignore its rulings in *Copper Liquor* II and III which were decided 6 and 8 years respectively after the *Johnson* decision.

IV. *BLANCHARD* FAILS TO INCLUDE THE TIME OF LAW CLERKS AND PARALEGALS AS PART OF THE ATTORNEY'S FEE

The *Blanchard* decision failed to account for the many hours of work performed by counsel's paralegals and law clerks to whom various tasks were assigned (at a substantially reduced rate calculation) and whose work provided excellent results to counsel and for the client. The *Blanchard* court stated, "Moreover, any hours 'billed' by

law clerks and paralegals would also naturally be included within the contingent fee." *Blanchard, supra* at 432.

The United States Supreme Court has approved compensation for law clerks in a similar case when it affirmed 84.5 hours of law clerk time as part of a $245,456.25 fee. See *City of Riverside, supra* at 2687 and 2698.

The First Circuit accepted the validity of charging separately for paralegals and law clerks in *Jacobs v. Mancuso,* 825 F.2d 559 (lst Cir. 1987). That court declared,

> "We . . . reject defendants' approach and also the view that, like the administrative staff, paralegals and law clerks should be considered part of the overhead included in counsel's fee. Rather, the use of such personnel is to be encouraged by separate compensation in order to reduce the time of more expensive counsel." *Id.* at 563.

The Fourth Circuit, in affirming a fee of $372,942.00, approved $40.00 to $60.00 per hour for law clerks and $35.00 to $50.00 per hour for paralegals. *Vaughns v. Board of Education of Prince Georgies' County,* 770 F.2 1244, 1245 (4th Cir. 1985).

The Sixth Circuit included paralegals in a § 1988 award in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 639 (6th Cir. 1979).

The Ninth Circuit approved a paralegal fee award twelve years ago in a Longshoremen's and Harborworkers' Compensation Act case; the court commented that:

> "One of the necessary incidents of an attorney's fees is the attorney's maintaining of a competent staff to assist him. Paralegals and other assistants can free the attorney for greater productivity in more important areas. . . . paralegal time at paralegal rates can reasonably be counted along with attorney's time as 'attorney fees' " *Todd Shipyards Corporation v. Director, Office of Workers' Compensation Programs,* 545 F.2d 1176, 1182 (9th Cir. 1976).

In 1983, the Tenth Circuit said, "We recognize the increasingly widespread custom of separately billing for the services of paralegals and law students who serve as clerks." *Ramos v. Lamm, supra* at 558.

The Eleventh Circuit included, as attorney's fees, paralegal time at $30.00 per hour. *Walters v. City of Atlanta, supra* at 1151.

More to the point, the Fifth Circuit granted its imprimatur to the award of fees for legal assistants. In the Title VII sex discrimination case, *Richardson v. Byrd,* 709 F.2d 1016 (5th Cir. 1983), *cert. denied,* 464 U.S. 1009, 104 S.Ct. 527 (1984), the Fifth Circuit approved fees ranging from $30 to $50 per hour for three paralegals. The court said arguments denying paralegal fees were without merit and stated that, "The record shows that the three paralegals assisted the lawyers at trial, organized and reviewed class members' claims, participated in telephone conferences with lawyers, witnesses, and class members, and performed complex statistical work." *Id.* at 1023. See also *Cruz v. Hauck,* 762 F2d 1230, 1235 (5th Cir. 1985).

A fee award is being claimed in the present case for the vital legal assistance of two law clerks and a senior paralegal. The work they performed had to be accomplished whether by partner, associate, paralegal or law

clerk. Specifically, Mr. K. Clark Phipps (then a senior student at Tulane Law School and now an attorney practicing in Oklahoma) assisted in legal research, the preparation of evidence, and the location of witnesses. He accompanied counsel to depositions where he suggested highly pertinent questions based upon his research. After the graduation of Mr. Phipps, Mr. Gregory Touchet became counsel's law clerk as a Tulane Law School senior student; he now is in practice in Lafayette, Louisiana. In addition to the gathering of evidence and dealing with witnesses, Mr. Touchet assisted counsel for three days at trial. Following that successful trial, he thoroughly researched and wrote the first drafts of both the trial court and, subsequently, Fifth Circuit briefs on the fee applications. The principal paralegal on the case,[2] Mrs. Karen Clesi Arthur, is a former legal secretary with over 10 years experience, a cum laude graduate of Tulane University, and holds a paralegal certificate as a graduate of the ABA accredited Tulane Paralegal Studies Program. At the time of the Blanchard trial, she had five years paralegal experience.

All work capable of being handled by law clerks and paralegals was delegated to them. By that delegation, counsel was effectively and ethically reducing the amount of higher rate fee time. To date, unfortunately, that has worked to counsel's detriment.

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[2] Counsel's secretary, Mrs. Marilyn Pisano Hansen, also performed some paralegal functions. Secretarial time was *not* included in the fee application but her paralegal functions were included. Prior to becoming counsel's secretary, she had performed duties as a legal secretary, paralegal, and office manager in another office.

In a broader sense, if attorneys cannot be compensated for the valuable services of legal assistants, it will adversely affect the promising future of the paralegal profession and the only generally accepted "internship" for law students. Needless to say, it will substantially increase the cost of legal services to clients. Fortunately, the granting of fees for legal assistants as part of the attorney's fee is the national trend.

In December, 1987, in an opinion by Judge Wisdom of the Fifth Circuit, the court wrote:

> "This court has long recognized that the work of paralegals and other nonlawyers is compensable as part of attorney's fees under the federal civil rights laws. See *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974)." *Concord Limousines v. Loloney Coachbuilders*, 835 F.2d 541, 547, N. 25 (5th Cir. 1987) [the reference to *Johnson* is noteworthy because the same court used *Johnson* to deny law clerk and paralegal fees only a month earlier in *Blanchard*.]

The Seventh Circuit put it succinctly: "We feel that the better rule is to allow compensation for law clerks as attorneys' fees under § 1988. Such policy encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." *Cameo Convalescent Center, Inc., v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984).

The United States Supreme Court has not specifically ruled upon the validity of the use of paralegals and law clerks in today's legal market. The indications, however, are clear that this Court and many circuits recognize the

utility of using paraprofessionals in saving time of the supervising attorney and saving money of the client. It is respectfully suggested that now is the opportunity for specific recognition of these facts by the Supreme Court of the United States. The time of paralegals and law clerks should be considered part of and be included in the calculation of total services for which an attorney's fee is due.

V. FACTUAL AND PROCEDURAL CONFUSION IN BLANCHARD

In addition to the Fifth Circuit's failure in *Blanchard* to follow a prior decision of the United States Supreme Court, and disregarding *Blanchard's* conflict with every circuit, the opinion is factually and procedurally confusing. Does the opinion mean that Arthur Blanchard must pay the $4,000.00 fee out of his own $10,000.00 damage recovery, or does it mean that the defendants must pay the $4,000.00 fee? The decision is silent. If it is the latter, clearly the fee is not the classic contingent fee since, in that situation, an attorney accepts as a fee part of that which his *client* recovers. If it is the former, then the decision is contrary to the intent of Congress; it would operate to the benefit of those who have violated civil rights and to the detriment of the victim. *City of Riverside, supra* at 2694, 2697, 2698. See also *Cooper v. Singer, supra.*

The Fifth Circuit decision in *Blanchard* also is confusing in the Court's statement that, "[T]he reason enunciated for this limit [the contingent cap allegedly required by *Johnson*] is that an appellant will not be given a windfall via § 1988." It is not the client who receives the attorney's fee as suggested by the Fifth Circuit, but it is

the attorney who receives the fee. And the attorney does not receive a "windfall" if the lodestar standards are correctly applied. *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 1546 (1984); *City of Riverside, supra* at 2697.

VI. ATTORNEY FEES SHOULD BE AWARDED FOR TIME DEVOTED TO THE FEE APPLICATION

The *Blanchard* decision did not take cognizance of fees due for trial and appellate level work on the attorney's fee issue. This failure conflicts with stated Fifth Circuit policy in *Cruz v. Hauck, supra,* in which the court decreed, "It is settled policy that a prevailing plaintiff is entitled to attorney's fees for the effort entailed in litigating a fee claim and securing compensation." (citations omitted) *Id.* at 1233. See also *Riddell v. Nat'l Democratic Party,* 712 F.2d 165, 171 (5th Cir. 1983), *reh'g denied,* 718 F.2d 1096 (5th Cir. 1983) [the court remanded the case for consideration of plaintiff's time spent on recovering the attorney's fees]; *Weisenberger v. Huecker,* 593 F.2d 49 (6th Cir. 1979), *cert. denied,* 444 U.S. 880, 100 S.Ct. 170 (1979); *Bond v. Stanton,* 630 F.2d 1231 (7th Cir. 1980), *cert. denied,* 454 U.S. 1063, 102 S.Ct. 614 (1981). *Copper Liquor,* III, *supra.*

VII. FEES AND TIME CLAIMED

The original application (R. 84-85) of counsel for Arthur Blanchard sought attorney's fees on an hourly basis as follows:

Senior attorney, partner, trial counsel	150.00/hour
Associate attorney	115.00/hour
Paralegal	65.00/hour
Law clerk	25.00/hour

All amounts were based upon normal hourly billing rates in effect in *1986*.

The *Blanchard* ad hoc judge sitting in the Western District of Louisiana indicated that, " . . . plaintiff's rates are high and holds that $100.00/hour is a reasonable rate." (Cert. Appendix 14A). Apparently, the court believed counsel's fee rate and the rate of the associate attorney should be the same. Paralegal and law clerk time was not awarded.

From a total of all hours (partners, associates, law clerks, and paralegal) of approximately 385 hours, the trial judge awarded only 97 hours, 20 minutes. He then reduced the resulting $9,720.00 to $7,500.00 declaring an abuse of billing judgment but without any specification as required to justify the "adjustment downward."

The lodestar calculation method approved by the Supreme Court and every federal circuit (except the Fifth Circuit in *Blanchard*) requires that a computation be made of the number of hours of service multiplied by the normal hourly rate charged. Each hour was documented in conservative 10 minute intervals (many offices use 15 minute time segments). (R.84-85, deposition, Exhibit A). Counsel's reputation, after more than twenty years of trial practice, and the range of fees in the community

were set forth in affidavits attached to the trial court fee application memorandum. (R. *supra*, Exhibits B & C).

The Supreme Court approved a fee rate of $125.00 per hour in *City of Riverside, supra* at 2698. The Fifth Circuit, in May, 1987, approved fee rates of $175.00 per hour for lead counsel and $125.00 per hour for associate counsel. *Hall v. Ochs*, 817 F.2d 920, 928, (lst Cir. 1987). The Fifth Circuit, reversing a $100.00 per hour rate awarded by the Western District of Louisiana (the *Blanchard* district) stated, "The district court's reduction of Mr. Walker's hourly rate from $125 to $100 was error. . . . [W]e modify the district court's judgment to award attorney's fees at the rate of $125 per hour . . . " *Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 552, 553 (5th Cir. 1987).

After the lodestar calculation, many courts then discuss the application of the twelve *Johnson* factors. But, the *Johnson* application itself has been cited as being in "disarray". *Bhandari v. First National Bank of Commerce*, 808 F.2d 1082, 1104 (5th Cir. 1987). It is easy to see why there is question: The *Blanchard* trial court proclaimed that, "Preclusion of other employment [a *Johnson* factor] should have been non-existent." (Cert. Appendix 13A); but if counsel spent time on *Blanchard*, is it not self-evident that the time detracted from other legal services? What of the three out-of-town trial days? The trial court declared that " . . . this was not a case of 'exceptional success' " *Id;* the plaintiff was awarded both compensatory and punitive damages against a deputy sheriff in a rural parish in a case where witnesses were afraid to testify. Mr. Blanchard was overjoyed with the result. The Fifth Circuit's "cap" in *Blanchard* further confirms the

"disarray" of the *Johnson* pre-§ 1988 criteria. Compare with *Copper Liquor,* II and III, *supra.*

Counsel requests the following fees:

Through trial on the merits	$	36,780.00
Through trial court fee application	$	3,910.30
Through Fifth Circuit appeal[3] (research, and writing appellate brief, reply brief, argument preparation, oral argument)	$	5,080.50
	$	45,770.80

Hours on the Supreme Court process:

Petition for Certiorari and partial completion of brief (through July 26, 1988)

Counsel: 130.25 hours

Paralegal: 19 hours

The hours counsel seeks are valid and supported. The fee rates are reasonable, especially when the length of time is considered before any fee payment will be made. And should not there be an additional, upward adjustment for practice before the Supreme Court of the United States?

---

[3] The amount of $2,310.00 listed in Plaintiff-Appellant's Fifth Circuit brief, p.36, as "Fees for Appeal" included only partial time. It did not include finalization of the appellate brief, the reply brief, research on the appellee brief, argument preparation, or oral argument.

CONCLUSION

The rule set by the *Blanchard* decision is contrary to the intent of the Civil Rights Attorney's Fee Award Act and substantially differs from holdings of this Court and others throughout the United States. A consistent, unequivocal policy is needed to fulfill the intent of Congress, to reduce attorney's fee controversies in federal courts, to reward fairly attorneys who undertake unpopular civil rights cases, and to approve the nationwide, accepted usage of legal assistants by allowing their valuable time to be part of the fee of the attorney who supervises them. Accordingly, petitioner respectfully seeks the following relief:

1. A reversal of the Fifth Circuit decision in *Blanchard v. Bergeron, et al.*

2. A ruling conclusively establishing "lodestar" as the standard by which to calculate § 1988 fees.

3. A ruling that the *Johnson* criteria which conflict with "lodestar" should not be considered in a § 1988 award; in particular, that the existence of a contingent fee contract should not form a cap on any award.

4. A ruling that encourages attorneys to utilize legal assistants, paralegals and law clerks, and, as such, the endorsement of this Court that their work shall be considered part of the § 1988 attorney's fee.

5. A ruling that the time spent by the successful civil rights attorney in seeking or protecting his or her fee is compensable time.

6. A ruling that an hourly fee rate shall not be pegged to past precedent but should be computed by

current standards which are as timely and flexible as attorneys have been in applying the various civil rights statutes for the benefit of their clients.

7. A ruling that the fee rate of $150 per hour for counsel (with an additional amount for practice before the Supreme Court of the United States) and the lesser rates for others as set forth are consistent with the rulings of this Court and, therefore, are reasonable within the guidelines of Civil Rights Attorney's Fee Award Act of 1976.

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ARTHUR J. BLANCHARD

(1)

No. 87-1488

In The

Supreme Court of the United States

October Term, 1988

ARTHUR J. BLANCHARD,

Petitioner,

v.

JAMES BERGERON, SHERIFF CHARLES FUSELIER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, BARRY BREAUX, OUDREY GROS, JR., DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE, GHI INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Plaintiff-appellant, Arthur Blanchard, originally filed a petition in Federal District Court for the Western District of Louisiana (Lafayette Division) alleging violations of his civil rights under 42 U.S.C. 1983, by Deputy James Bergeron, Sheriff Charles Fuselier and the St. Martin Parish Sheriff's Department. He joined with his civil rights claim, a state law negligence claim against the aforementioned and the owners, and a manager of Oudrey's Odyssey Lounge and Oudrey's Odyssey Lounge. After a trial by jury, the plaintiff was awarded FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS in punitive damages against Deputy Bergeron and FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS in compensatory damages against Deputy Bergeron, Sheriff Charles Fuselier and Oudrey's Odyssey Lounge. A Judgment was entered consistent with the jury verdict and plaintiff was awarded attorney fees to be later fixed by the Court.

Pursuant to the Court's order, plaintiff's counsel submitted time, cost and expense records in support of his claim for THIRTY SIX THOUSAND SEVEN HUNDRED EIGHTY AND NO/100 ($36,780.00) DOLLARS in attorney fees and FIVE THOUSAND FIVE HUNDRED ELEVEN AND 92/100 ($5,511.92) DOLLARS of expenses. Defendant vigorously opposed an attorney's fees award of this magnitude under these circumstances. The Trial Court was furnished with the deposition of the plaintiff's attorney which showed excessive, redundant and otherwise unnecessary hours billed. Through the deposition, defendant discovered that plaintiff's attorney had accepted the case on referral with a forty percent (40%) contingency fee. After a very detailed review of billing

and cost records furnished by plaintiff's counsel, the trial court held that a reasonable number of hours to handle this case was 97 hours 20 minutes (96 hours by plaintiff's counsel, Mr. Rosen and 1 hour 20 minutes by Mr. Rosen's associate, Ms. Dombourian). The Court found that ONE HUNDRED AND NO/100 ($100.00) DOLLARS per hour was a reasonable hourly rate and therefore arrived at a "lodestar" of NINE THOUSAND SEVEN HUNDRED TWENTY AND NO/100 ($9,720.00) DOLLARS. However, due to plaintiff's abuse of "billing judgment", the elemental nature of the litigation and the contingency fee arrangement, the trial court adjusted the "lodestar" down to SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7,500.00) DOLLARS. The trial court awarded cost and expenses of EIGHT HUNDRED EIGHTY SIX AND 92/100 ($886.92) DOLLARS. From this judgment the plaintiff appealed.

The district court made a factual finding that the appellant and his attorney entered into a forty percent (40%) contingency fee agreement. The Fifth Circuit, having found that this factual finding was not erroneous and was supported by the appellant's trial counsel's deposition, held that the contingency fee agreement "serves as a cap on the amount of attorney's fees to be awarded." *Blanchard v. Bergeron*, 831 F. 2d 563, 564 (5th Cir. 1987). The Court further found that "any hours billed by law clerks or paralegals would also naturally be included within the contingency fee." *Blanchard*, supra. From this judgment the appellant applied for a writ of certiorari.

Appellant's writ application was granted on June 27, 1988.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision to limit the plaintiff's recovery of attorney's fees to the amount which he had contracted to pay his attorney under a contingency fee contract will prohibit a windfall to the plaintiff or his attorney without acting as a disincentive to the handling of other civil rights cases upon different contractual terms. The Civil Rights Attorney's Fees Awards Act of 1976 was passed by Congress to foster the enforcement of the Civil Rights Act by means of fee shifting. In passing on the cost of prosecution from the victim to the violator, Congress showed a grave concern that civil rights defendants would be taken advantage of through the lack of billing judgment of civil rights plaintiffs and their attorneys.

Congress acknowledged the standards set out in *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974) as the appropriate standard by which an attorney's fees award should be governed. The Johnson court held that although the agreement which exists between a plaintiff and his attorney is not dispositive of the reasonableness of a fee, in no event should the litigant be awarded a fee greater than he is contractually bound to pay. Congress' acknowledgment of such a limit may be found in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976. To assist private citizens in asserting their civil rights and to prevent those who

violate the nation's fundamental laws from proceeding with impunity, civil rights plaintiffs should be able to recover "what it costs them" to vindicate their rights. Senate Report Number 94-1011, p. 2 (1976) reprinted at U.S. Code Congressional and Administrative News 1976, p. 5908 (hereinafter S. Report). Allowing recovery by the plaintiff of what prosecution "cost them" prevents a windfall without conflicting with the decision of this court in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986).

This Court in *City of Riverside*, supra, was not willing to accept a blanket rule limiting attorney's fees in civil rights cases to a proportion of the damages awarded. Contingency fee arrangements which make legal services available in ordinary personal injury cases would not necessarily encourage lawyers to accept all meritorious civil rights cases as many involve substantial expenditures of time and effort, but produce only small monetary recoveries. Certainly this Court did not intend to prevent a civil rights plaintiff from contracting with his attorney for the payment of attorney's fees based on a specified percentage of the recovery. In such a case, the defendant should not be required to pay more than the plaintiff is contractually bound to pay his attorney.

The time billed by law clerks and paralegals is necessarily included within the contingency fee. The Fifth Circuit did not disallow an award for legal support personnel, but rather held that any payments due them was naturally included within the contingency fee. The contract does not provide for the additional payment to law students, law clerks or paralegals, and any amount recovered by the plaintiff or his attorney for time billed

by such legal support personnel would be a windfall to the plaintiff. In order to determine whether separate compensation is in order, the Court must first make a determination as to whether or not the services are normally part of the office overhead in the area and thus reflected in normal billing or in the contingency fee as the case may be. *Ramos v. Lamm*, 713 F. 2d 546 (10th Cir. 1983).

ARGUMENT

The Fifth Circuit, in the case at bar, limited the plaintiff's recovery of attorney's fees to the amount which he had contracted to pay his attorney under a contingency fee contract. The trial court found that plaintiff and his counsel had entered into a contingency fee contract providing for attorney's fees equal to forty percent (40%) of the amount collected, i.e. FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS, (Cert. appendix 14a). The Court accepted this finding as factually supportive and not clearly erroneous. An award of fees in excess of this contractual amount would provide a windfall to the plaintiff or his counsel.

I. LIMITING THE RECOVERY OF ATTORNEY'S FEES TO THE AMOUNT THE PLAINTIFF IS OBLIGATED TO PAY HIS ATTORNEY UNDER A CONTINGENCY FEE CONTRACT WILL PROHIBIT WINDFALLS TO ATTORNEYS WITHOUT ACTING AS A DISINCENTIVE TO THE HANDLING OF CIVIL RIGHTS CASES UPON DIFFERENT CONTRACTUAL TERMS.

In 1976, Congress amended 42 U.S.C. 1988 "to allow courts to provide the familiar remedy of reasonable counsel's fees to prevailing parties in suits to enforce the Civil

Rights Acts which Congress has passed since 1866." S. Reports p. 2. "Congress enacted Section 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 (1986). Congress' intent to provide legal assistance to less fortunate citizens is evident in the legislative history of the amendments to 42 U.S.C. 1988.

> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. Those private citizens are to be able to assert their civil rights, and if those who violate the nations fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Reports, supra, p. 2.

While Congress fully intended to make the representation of the less fortunate attractive, they clearly intended to do so without providing windfalls to attorneys. S. Report, supra, p. 6.

A. 42 U.S.C. 1988 IS THE MECHANISM DESIGNED BY CONGRESS TO SHIFT THE ECONOMIC BURDEN OF PROSECUTING CIVIL RIGHTS VIOLATIONS FROM THE VICTIM TO THE VIOLATOR.

In order to attract competent counsel to handle civil rights cases, it was necessary that they be allowed to recover reasonable attorney's fees for the successful prosecution of civil rights claims. The legislative history of Senate Bill 2278 clearly indicates that the amendment to 42 U.S.C. 1988 was intended as a fee shifting provision,

i.e. a mechanism by which to shift the costs of prosecution from the victim to the violator. "If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover *"what it costs them"* to vindicate these rights in court." S. Report, p. 2, (Emphasis added). Since a successful plaintiff would be able to recover his attorney's fees from a civil rights defendant, Congress felt that safeguards were necessary to protect against the possibility of excess fee awards.

This Court in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 recognized a few of the safeguards designed to protect civil rights defendants. This Court indicated that under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), the District Court has the discretion to deny fees to prevailing plaintiffs under special circumstances. Under *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978), the District Court has the discretion to award attorney's fees against plaintiffs who litigate frivolous or vexatious claims. This Court has most recently held that a civil rights defendant is not liable for attorney's fees incurred after a pre-trial settlement offer where the Judgment recovered by the plaintiff is less than the pre-trial offer. *Marek v. Chesney*, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985).

Congress cited *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974) as the appropriate standards by which an attorney's fees award should be governed. The Johnson court held that although a court's decision concerning the amount of fees to be awarded is not

determined by the agreement which exists between the client and the attorney, "in no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay if indeed the attorneys have contracted as to amount." The Fifth Circuit and Congress were not willing to flatly require that a civil rights defendant pay the fees which a meritorious civil rights plaintiff had agreed to pay his counsel due to the lack of protections and safeguards in such a system. Both the Court and Congress did, however, recognize that a civil rights defendant should not be required to pay more than the plaintiff had contracted to pay his attorney. The fee shifting provision employed by 42 U.S.C. 1988 was designed to provide competent counsel to enforce our civil rights and not as an additional punitive damage provision. This Court has for some time allowed the recovery of punitive damages in particular civil rights cases, *City of Newport, et al v. Fact Concerts, Inc.*, 453 U.S. 245, 101 S. Ct. 2748 (1981). In passing Section 1988, Congress did not intend and the legislative history is void of an indication that Congress intended the provisions of this Section to serve as additional penalties for civil rights violators.

B. AFFIRMATION OF THE FIFTH CIRCUIT'S DECISION IN THIS CASE WILL NOT ACT AS A DISINCENTIVE TO HANDLING CIVIL RIGHTS CASES ON DIFFERENT CONTRACTUAL BASES.

A decision to limit an award of attorney's fees to an amount no greater than that which the plaintiff contracted to pay his attorney would not act as a disincentive to attorneys handling other civil rights cases under different contractual bases. All civil rights attorneys are aware of the provisions of Section 1988 whereby they are allowed

the recovery of reasonable fees for the successful prosecution of civil rights claims. If an attorney contracts with his client to represent him for the court awarded fee or under a straight contingent fee arrangement where his fee is not based on a percentage of recovery, then under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), he would be awarded a reasonable fee by the court. If an attorney is willing to accept a case on a contingency to receive a specified percentage of the damages recovered, then the defendant should not be required to pay more than the plaintiff contracted to pay his attorney. There exists no known prohibition against an attorney entering into a contract to receive the greater of a specified percentage of the recovery or the fees as set by the court.

In *Hernandez v. Hill Country Telephone Cooperatives, Inc.*, 349 F. 2d 139 (5th Cir. 1988), the plaintiff entered into an entirely contingent fee contract with his attorney whereby if the plaintiff was not successful, no fee was due; if the suit was successful, but no attorney's fees were awarded, counsel would receive 50% of the sums recovered by the plaintiff; if the court set attorney's fees in an amount less than 50% of the plaintiff's recovery, the plaintiff would add the difference to the fee; if the fees as set by the court equalled or exceeded 50% of the plaintiff's recovery, then the plaintiff would pocket his full recovery and the attorney would take the fees as set by the court. The Fifth Circuit held that this contractual arrangement in a case requiring a substantial investment of attorney time and funds for proper preparation and

trial was not proscribed by either *Johnson* or other of that court's precedence or that it was otherwise an unreasonable arrangement. The contract alluded to in *Hernandez*, supra, allows the attorney to receive a reasonable fee for the successful prosecution of the claim without compelling the defendant to pay a fee in excess of that which the plaintiff had contractually bound himself to pay his attorney. The incentive to handle civil rights cases would not be adversely affected nor would the defendant be required to pay a fee greater than that which the plaintiff contracted to pay his attorney.

C. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *CITY OF RIVERSIDE V. RIVERA*, 477 U.S. 561, 106 S. Ct. 2686 91 L. Ed 2d 466 (1986).

This Court in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) held:

> "That a rule limiting attorney's fees in a civil rights case to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting Section 1988."

In *City of Riverside*, supra, this Court affirmed an attorney's fees award of $245,456.25 in a case wherein the plaintiff recovered $33,350.00 in compensatory and punitive damages. This Court indicated that the amount of damages recovered is but one factor which the court must look at to arrive at a reasonable fee. A rule limiting attorney's fees to a proportion of the damages awarded would seriously undermine the purpose of Section 1988. The case at bar differs from *City of Riverside*, supra, in that no mention was made in that case, that the plaintiff

and his attorneys had entered into a contingency fee agreement whereby they agreed to accept the case for a specified percentage of the damages recovered only. By limiting the amount of attorney's fees recoverable to a proportion of the damages recovered, the court would be undermining the purpose of Section 1988 which is to insure that lawyers are willing to represent persons with ligitimate civil rights grievances even though they may not be able to afford legal counsel. By accepting any particular civil rights case for a percentage of the damages recovered, an attorney is making a financially motivated decision to collect as payment of his fees, a percentage of the damages recovered as opposed to a reasonable fee set by the court. As very adequately set out by the Fifth Circuit in the case at bar, neither the appellant nor Congress' purpose in enacting Section 1988 are disserved by a decision not to award a fee greater than the litigant is contractually bound to pay. The Fifth Circuit stated:

> "In reaching this conclusion, we disserve neither the appellant nor Congress' intention to foster the enforcement of the Civil Rights Act by means of fee-shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may not decide to accept another civil rights case on a contingent fee contract, but the outcome of this case should not be a disincentive to handling civil rights cases upon different contractual terms." *Blanchard v. Bergeron*, 831 F. 2d 563 5th Cir. 1987 (reprinted in the appendix at pgs. 1A-5A)

In *City of Riverside*, supra, this Court was concerned that contingency fee arrangements that make legal services available in ordinary personal injury cases would

not encourage lawyers to accept all meritorious civil rights cases as many involve substantial expenditures of time and effort, but produce only small monetary recoveries. While Congress was concerned with providing reasonable fees to successful civil rights plaintiffs, there was never an intention to interfere with an individual's right to enter into an attorney-client relationship in the "private market". As this Court so aptly noted in *Pennsylvania v. Delaware Valley Citizen's Council*, ___ U.S.___, 106 S. Ct. 3088 (1986):

> "These statutes (fee shifting statutes) were not designed as a form of economic relief to improve the financial lot of attorneys nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."

If plaintiffs, such as Arthur Blanchard, are able to obtain counsel to represent them on a contingency providing for the payment of attorney's fees on a specified proportion of the amount of damages recovered, then in those cases, the attorney can not be said to have relied on the statutory assurance that he would be paid any different fee under a fee shifting statute. As the Fifth Circuit noted in the instant case, "To the extent that fee awards in civil rights cases are intended to reflect fees charged "in the marketplace" for legal services, enforcement of the contingent fee contract here is appropriate." *Blanchard v. Bergeron*, 831 F. 2d 563 (5th Cir. 1987). The contract is

certainly evidence of the parties fee expectations at the inception of the case.

II. TIME BILLED BY LAW CLERKS OR PARALEGALS IS INCLUDED WITHIN THE CONTINGENCY FEE.

In placing a cap upon the attorney's fees recoverable by the plaintiff, the Fifth Circuit did not allow an award for legal support personnel but rather held that any payment due them was naturally included within the contingency fee, *Blanchard v. Bergeron*, supra. The plaintiff entered into a contingency fee contract with his attorney whereby he agreed to pay to his attorney, after trial, 40% of the amount recovered. The contract does not provide for the additional payment of law students, law clerks or paralegals. Because the plaintiff is not bound under the contingency fee contract to pay additional sums to his attorney for legal support personnel, any recovery by the plaintiff or his attorney for such payment would be a windfall which Congress specifically intended to prohibit.

The Fifth Circuit's finding is clearly limited to the situation where the plaintiff's attorney accepts the case on a contingency, with payment based on a specified percentage of the damages recovered. Certainly no evidence was presented at the trial level to indicate that the parties at any time intended that plaintiff would pay his attorney additional sums for time expended by legal support staff. Appellant respectfully requests that this court not make a determination with such a scant record on this issue.

Additionally, as was so aptly noted in *Ramos v. Lamm*, 713 F. 2d 546 (10th Cir. 1983), in order to award separate compensation for the work of law clerks and paralegals, the Court must make a determination as to whether or not such services are normally part of the office overhead in the area and thus already reflected in the normal billing rate established by the court. It is suggested to the Court that in contingency fee cases, the fees of paralegals and law clerks are reflected in the percentage of recovery and should not be billed separately.

CONCLUSION

Any recovery by the plaintiff or his attorney of fees in excess of the amount which the plaintiff had obligated himself to pay his attorney would be a windfall and contrary the intent of Congress in passing 42 U.S.C. 1988. By affirming the Fifth Circuit decision, this court would not disserve the appellant nor Congress' intention to foster the enforcement of the Civil Rights Act. The "cap" placed by the Fifth Circuit will not act as a disincentive to attorneys handling civil rights cases under different contractual terms.

The recovery of additional sums for the time billed by law clerks and paralegals is naturally included in the contingency fee and any additional sums would be a

windfall to the plaintiff or his attorney in derogation of Congress' intent in passing the Civil Rights Attorney's Fees Act of 1976.

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(4)

NO. 87-1485

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR J. BLANCHARD,
Petitioner,

VERSUS

JAMES BERGERON, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONER FOR AMICI CURIAE ADVOCACY CENTER FOR ELDERLY AND DISABLED, APPELLATE ADVOCACY PROGRAM, BLS LEGAL SERVICES, CORP., INSTITUTE FOR PUBLIC REPRESENTATION, LOUISIANA TRIAL LAWYERS ASSOCIATION, JAMES GREEN, JAMES KELLOGG, AND GERALD LOPEZ

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INTEREST OF AMICI

The Advocacy Center for the Elderly and the Disabled is a nonprofit legal organization that provides legal services to disabled individuals throughout Louisiana. The Center regularly seeks attorney's fee awards in cases under §§ 504 of the Rehabilitation Act and under the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142. The Appellate Advocacy Program is a clinical program of Tulane Law School. The Program will regularly seek court awarded attorney's fees for appellate work performed by its faculty and enrolled students. The BLS Legal Services Corp. is a corporate entity under which Brooklyn Law School's clinical programs operate. The

Corporation has regularly sought and received court-awarded fees for work performed by students enrolled in the Law School's clinical programs. The Institute for Public Representation is a clinical program at the Georgetown University Law Center. The Institute has sought and received court-awarded attorney's fees for work performed in civil rights and Freedom of Information Act litigation by its staff attorneys and law students enrolled in its clinical program.

James Green, James Kellogg, and Gerald Lopez are attorneys who regularly represent civil rights and civil liberties clients in federal courts in Louisiana, Florida, New York, California, and other parts of the Nation.

SUMMARY OF ARGUMENT

I. The Fifth Circuit panel's use of a contingency fee agreement as an automatic upper cap on the fees awarded under §§ 1988 is contrary to Congressional intent, inconsistent with the decision of this and other Courts, and would have severe negative repercussions.

Many civil rights cases address violations of constitutional rights which are non-pecuniary in nature and which do not produce large damages awards. Limiting plaintiffs' recovery of attorney's fees to a percentage of these small awards would make it difficult for many citizens to vindicate their civil rights.

This Court has rejected the argument

that statutory fee awards should be modeled after contingency fee agreements. Likewise, the great weight of authority among the Courts of Appeals, including the Fifth Circuit, discounts the use of contingency fee agreements in awarding statutory fees.

Imposition of an automatic contingency fee cap would be unfair to plaintiffs, by allowing defendants' attorneys to litigate tenaciously over small damages awards, while plaintiffs' attorney's fees would be limited to a percentage of those damages awards. The cap would also represent a windfall, not intended by Congress, to defendants in those cases most likely to result in a monetary award to plaintiffs. The fee cap would also force the parties to focus too heavily upon increasing the

size of damages awards, rather than upon obtaining the most effective declaratory or injunctive relief.

II. The panel below also was incorrect in suggesting that it could not award separate compensation for paralegals and law clerks. This Court should not base a decision with potentially broad implications upon the panel's ambiguous statement.

This Court and ten of the Courts of Appeals have approved separate compensation for legal support personnel and the Congressional intent behind §§ 1988 is clear. Under §§ 1988, civil rights plaintiffs are to be treated the same as the fee-paying clients of traditional law firms conducting complex federal litigation.

Separate compensation for legal

support personnel, at an hourly rate lower than that appropriate for members of the bar, is a traditional practice which keeps down the cost of legal representation. Separate compensation is especially necessary in enforcing civil rights. To conduct this important litigation, law firms, public interest organizations, and law school clinical education programs often must rely heavily on legal support personnel. Separate compensation for legal support personnel should therefore be upheld for civil rights plaintiffs.

ARGUMENT

I. TREATING A CONTINGENCY FEE CONTRACT AS AN AUTOMATIC CAP IN CIVIL RIGHTS LITIGATION IS CONTRARY TO CONGRESSIONAL INTENT, INCONSISTENT WITH DECISIONS OF THIS AND OTHER COURTS, AND AGAINST PUBLIC POLICY.

A. The Decision Below is Contrary to the Congressional Intent and Purposes Behind the Civil Rights Attorney's Fees Awards Act and the Civil Rights Acts.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that "[i]n any action or proceeding to enforce [various civil rights acts, including 42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988.

Fee shifting provisions have been utilized repeatedly by Congress, in recognition that "private attorneys

general" must undertake much of the enforcement of the underlying laws. See Report of the Senate Judiciary Committee, S.Rep. No 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5912 [hereinafter "Senate Report"]. It is clear that Congress intended a direct linkage between the enforcement of civil rights laws and the availability of fee awards: "fee awards are an integral part of the remedies necessary to obtain [full] compliance" with civil rights laws. Id. at 5 (emphasis added).

Statutory fee shifting is especially necessary for the enforcement of civil rights laws.

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover

> what it cost them to vindicate these rights in court.

Id. at 2. Fee shifting is essential to achieving the goals of the Reconstruction Era civil rights acts: compensating the victims of civil rights violations; requiring violators of constitutional rights to pay for their violations; and deterring subsequent unconstitutional acts. "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting." Senate Report, p.6.

The instant case involves individual police misconduct, for which the jury awarded compensatory and punitive damages. This is precisely the situation in which this Court has

found the imposition of damages, including attorney's fees, to be the appropriate remedy. "[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future. . . . This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable." City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) (citation omitted).

Many civil rights cases, however, do not produce large damages awards. Many result in only injunctive or declaratory relief or nominal damages. Hence, this Court has explicitly rejected any rule of proportionality (between the relief obtained and the fees awarded) because such a rule "would make it difficult, if

not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts . . . . Congress determined that it would be necessary to compensate lawyers for all time reasonably expended." Rivera, 477 U.S. at 578 (relying upon House Report, Senate Report, and Senate remarks on §§ 1988).

Not surprisingly, therefore, the Courts of Appeals have determined that treating a contingency fee contract as a ceiling on statutory attorney's fee awards "would run counter to the intention of Congress to encourage successful civil rights litigation." Sisco v. J.S. Alberici Constr. Co., 733 F.2d 55, 57 (8th Cir. 1984). Accord Quesada v. Thomason, 850 F.2d 537,

540-41 (9th Cir. 1988) (specifically rejecting the Fifth Circuit's approach in the instant case). See also Fleet Inv. Co. v. Rogers, 620 F.2d 792, 793 (10th Cir. 1980) (fees in odometer rollback case); Sullivan v. Crown Paper Bd. Co., 719 F.2d 667, 669 (3d Cir. 1983) (age discrimination in employment case, relying upon legislative intent behind § 1988).

B. The Decision Below is Inconsistent with the Decisions of This Court and is Totally Contrary to Rulings of the Other Courts of Appeals.

As elaborated in Petitioner's Brief, the other Courts of Appeals have rejected the approach taken by the Fifth Circuit panel in the instant case. See, e.g., Quesada, 850 F.2d at 541 ("We

conclude that the purposes of section 1988, recent Supreme Court cases, and our own precedents do not support this understanding.") (footnote omitted); Lewis v. Coughlin, 801 F.2d 570, 575 (2d Cir. 1986); Sisco, 733 F.2d at 56-57; Cooper v. Singer, 719 F.2d 1496, 1503 (10th Cir. 1983) (en banc); Sargeant v. Sharp, 579 F.2d 645, 649 (1st Cir. 1978). [1]

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1. Even other Fifth Circuit panels appear to differ with the panel in the instant case. See, e.g., Brantley v. Surles, 804 F.2d 321, 326-27 (5th Cir. 1986); Copper Liquor, Inc. v. Adolf Coors Co., 624 F.2d 575, 583 n.14 (5th Cir. 1980).

Imposition of an automatic cap on attorney's fees based upon a contingency fee arrangement also is inconsistent with this Court's decision in City of Riverside v. Rivera, 477 U.S. 561 (1986). There, this Court roundly rejected the argument advanced by petitioners and the Solicitor General "that fee awards in damages cases should be modeled upon the contingent fee arrangements commonly used in personal injury litigation." Id. at 573.

Justice Brennan's opinion for a plurality of 4 members of the current Court demonstrated that such an approach "would seriously undermine Congress' purpose in enacting §§ 1988," id. at 576, because such contingency fee arrangements "would often not encourage lawyers to accept civil rights cases,

which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." Id. at 577. Justice Powell agreed:

> It is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases. I therefore find petitioners' asserted analogy to personal injury claims unpersuasive in this context.

Id. at 586 (Powell, J., concurring in judgment). Though insisting upon reasonableness in fee awards, even the dissent in Rivera announced: "I agree with the plurality that the importation of the contingent-fee model to govern fee awards under §§ 1988 is not warranted by the terms and legislative history of the statute." Id. at 595 (Rehnquist, J., dissenting). See generally S.

Nahmod, Civil Rights and Civil Liberties Litigation § 1:25 (2d ed. 1986 & Supp. 1987).

The court below sought support for its novel approach by quoting one sentence of dictum from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974). See Blanchard v. Bergeron, 831 F.2d 563, 564 (5th Cir. 1987). The court below plucked, out of context, a portion of the discussion of one single factor (of the 12 analyzed by Johnson). That court then applied that sentence in a wooden fashion to foreclose any statutory award above the contingency agreement level. Yet, the remainder of the Johnson opinion, the legislative history of the subsequent Attorney's Fees Awards Act, and recent judicial decisions all repeatedly stress

flexibility in determining the reasonableness of the fee award. Hence, it is not surprising that the Fifth Circuit panel's overly strict, "one dimensional" approach has been specifically rejected by other courts. See, e.g., Cooper, 719 F.2d at 1500-03; Sullivan, 719 F.2d at 669.

Even if the dictum from Johnson were now considered persuasive, it could, at most, suggest treating a contingency agreement as but one among several relevant factors (as the district court in this case did, see Pet. for Cert. at 13A), rather than as an automatic, absolute cap on attorney's fees (as the Fifth Circuit panel did). See, e.g., Rivera, 477 U.S. at 574; Sullivan, 719 F.2d at 669 ("At its clearest, the legislative mandate would therefore have

courts consider the existence of a contingency arrangement, while not allowing such consideration to thwart the enforcement of the substantive statutory rights that gave rise to the fee award provision."). As Justice White recently wrote for a plurality this Court: "At most, therefore, Johnson suggests that the nature of the fee contract between the client and his attorney should be taken into account when determining the reasonableness of a fee award. . . ." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S.Ct. 3078, 3085 (1987).

The court below also cited Pharr v. Hous. Auth., 704 F.2d 1216 (11th Cir. 1983), as support for its novel approach. See Blanchard, 831 F.2d at 564. However, in Pharr, the Eleventh

Circuit actually used the attorney-client contract as a basis for increasing the fee award. See Pharr, 704 F.2d at 1218. See also Hamner v. Rios, 769 F.2d 1404, 1409 (9th Cir. 1985) (so interpreting Pharr). Furthermore, the Eleventh Circuit subsequently refused to allow the determination of a reasonable statutory fee to be governed solely by contingency contracts. See Walters v. Atlanta, 803 F.2d 1135, 1152-53 (11th Cir. 1986). The court there felt that separate calculation of the statutory fee award more accurately reflected this Court's rulings. See generally Tucker v. Phyfer, 819 F.2d 1030, 1035-36 n.7 (11th Cir. 1987).

C. Applying the Approach of the Court Below to the Award of Attorney's Fees Would Have Severe Detrimental Consequences.

In addition to the negative implications for each of the Congressional purposes discussed in Part IA, above, adoption of the Fifth Circuit panel's approach would be severely unfair to the parties involved in civil rights litigation.

Salaried public interest litigators, working for such organizations as the American Civil Liberties Union, Pacific Legal Foundation, Mountain States Legal Foundation, law school clinics, or Legal Services Corporations often do not charge their clients any fees at all. Yet, this Court and lower courts have repeatedly, and correctly, ruled that such nonprofit legal services

organizations are nonetheless entitled to statutory fees, calculated by the usual method (lodestar plus multiplier, where appropriate). See, e.g., Blum v. Stenson, 465 U.S. 886, 896-97 (1984). See also pp. 47-48 of this Brief, below. The courts have repeatedly rejected any suggestion that a contract in which the client is not charged for the legal representation can serve as an absolute ceiling for fees. Likewise, a contingency fee agreement should not be utilized as the court below did, i.e. to award less than the "reasonable" fee allowed by § 1988. See generally Quesada, 850 F.2d at 542-43.

Contingency fee agreements may be entered into for reasons unrelated to the anticipated size of a damages award. A plaintiff may have a state law tort

claim pendent to a civil rights claim; such tied claims are common in cases involving individual police misconduct, like the instant case. In these cases, a contingency agreement could be more appropriate for the tort claim, as there probably would be no state fee shifting provision. The plaintiff could lose on the civil rights claim, but prevail on the state tort claim. See Paul v. Davis, 424 U.S. 693, 699-701 (1976). The contingency fee agreement covering the tort claim would provide the only vehicle for the impecunious plaintiff to pay his or her legal costs.

Furthermore, the client and attorney could well intend that the contingency agreement govern only the tort claim. They would then rely on § 1988 to govern the civil rights claim. See Quesada,

850 F.2d at 542 ("The attorney signs the [contingency] agreement knowing that statutory attorneys' fees will be available.") This acknowledgment that § 1988 applies to the civil rights claim would in no way be contrary to the Congressional goal of enforcing the civil rights laws. Indeed, such a bifurcated arrangement as to fees would keep down the cost of private civil rights enforcement, and would not produce a windfall to plaintiffs.

If the approach of the panel below were adopted, the result would be illogical and unfair. The Fifth Circuit has ruled that the fee contract is not binding upon the trial court, or defendants, if it involves more than a "reasonable fee." See Sellers v. Delgado Community College, 839 F.2d

1132, 1141 (5th Cir. 1988). See also Hamner, 769 F.2d at 1407-10. Further, under decisions of this Court, the contract would be abrogated, in whole or in part, if plaintiffs have rejected a Rule 68 settlement offer prior to a trial which produces less relief, see Marek v. Chesny, 473 U.S. 1 (1984), or if defendants have made an offer requiring a fee waiver. See Evans v. Jeff D., 475 U.S. 717 (1986). If the decision in the instant case were allowed to stand, a contingency fee agreement would be controlling in civil rights litigation in but a single situation. The contract could be used to limit attorney's fees only when plaintiffs prevail with a small damages award. Yet, this is precisely the situation where statutory fees have been

deemed most appropriate. See Rivera, 477 U.S. at 577; id. at 585-86 (Powell, J., concurring); Kerr v. Quinn, 692 F.2d 875, 877 (2d Cir. 1982); Senate Report, pp. 2, 5, 6.

The court below is incorrect in believing that its decision is necessary to prevent a windfall to plaintiff. First, any possible windfall would be prevented by a district court's calculation of "a reasonable attorney's fee" under the standards articulated by this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), Blum, Rivera, and other cases. These standards permit only the award of fees which accurately reflect the fair value of legal services on successful claims.

Second, any perceived danger of double recovery by plaintiff's attorney

can be avoided by the procedure and judicial orders employed by the Third Circuit and other Courts of Appeals in similar contingency contract cases. See Cooper v. Singer, 719 F.2d 1496, 1504, 1506-07 (10th Cir. 1983) (en banc); Sullivan v. Crown Paper Bd. Co., 719 F.2d 667, 669-70 (3d Cir. 1983). Indeed, the unique approach imposed by the court below actually gives a windfall to defendants (who have violated plaintiff's constitutional rights), based upon nothing more than the mere fortuity of the particular arrangement, between plaintiff and his or her attorney, to which the defendant is not a party. See Quesada, 850 F.2d at 543; Sullivan, 719 F.2d at 669 ("Such a result would also frustrate the legislative policy objective that the

fee itself serve as a disincentive to future discriminatory conduct.")

Third, it would also be severely unfair for defendants' lawyers, who are usually paid on a non-contingent basis, to litigate tenaciously on the merits of the constitutional claims and on the fee award issues, anticipating that plaintiff's attorney could not obtain any more than a specified proportion of a small damages award. See Rivera, 477 U.S. at 580-81 n.11.

Finally, the approach of the court below would force the parties in civil rights cases to focus upon increasing the size of damages awards, rather than upon obtaining the most effective declaratory or injunctive relief. See Quesada, 850 F.2d at 542; Cooper, 719 F.2d at 1503.

II. FEES FOR LAW STUDENTS, LAW CLERKS, AND PARALEGALS ARE APPROPRIATE, DESIRABLE, AND NECESSARY IN CIVIL RIGHTS ACTIONS.

A. This Issue, Raised Only Ambiguously By the Court of Appeals, Should Not Form the Basis for Action By This Court.

After holding that a contingency fee arrangement constituted an automatic cap on the statutory award of attorney's fees under § 1988, see Part I above, the panel below compounded its error by disallowing any award for legal support personnel -- law students, law clerks, and paralegals. The panel stated: "Moreover, any hours 'billed' by law clerks or paralegals would also naturally be included within the contingency fee." Blanchard v. Bergeron, 831 F.2d 563, 564 (5th Cir. 1987). The panel offered no support for

this ambiguous statement.

The issue of separate compensation for legal support personnel was not briefed below; the Record regarding it is scant at best. It is unclear what result the panel below would have reached had there been no contingency fee agreement in effect. As a result, this issue has not been given any independent consideration apart from its entanglement with the contingency fee issue.

Amici respectfully submit that this Court should not speculate on the meaning of the Court of Appeals' language, particularly since this issue comes before this Court in such an usual posture. This Court should not necessarily assume that the Fifth Circuit has adopted a position which

apparently diverges radically from the overwhelming weight of the caselaw. This Court and at least ten Courts of Appeals, including the Fifth Circuit, have allowed separate compensation for legal support personnel. See, e.g., City of Riverside v. Rivera, 477 U.S. 561, 565, 581 (1986); Jacobs v. Mancuso, 825 F.2d 559, 563 (1st Cir. 1987); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Vaughns v. Bd. of Educ. of Prince George's County, 770 F.2d 1244, 1245 (4th Cir. 1985); Concorde Limousines, Inc. v. Maloney Coachbuilders, Inc., 835 F.2d 541, 547 n.25 (5th Cir. 1987); Northcross v. Bd. of Educ. of Memphis City Schools, 611 F.2d 624, 639 (6th Cir. 1979), cert., denied, 447 U.S. 911 (1980); Henry v. Webermeier, 738 F.2d 188, 192 (7th Cir.

1984); Dependahl v. Falstaff Brewing Corp., 496 F. Supp 215 (E.D. Mo. 1980), aff'd, 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981); Keith v. Volpe, 833 F.2d 850, 859, 860 (9th Cir. 1987); Walters v. City of Atlanta, 803 F.2d. 1135, 1151 (11th Cir. 1986); Jordan v. United States Dep't of Justice, 691 F.2d 514, 522-23 (D.C. Cir. 1982). See also Bogosian v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985). Cf. Ramos v. Lamm, 713 F.2d 546, 558 (10th Cir. 1983) (separately compensable only if not included in attorney's hourly rate).

This Court should not reach out to address this issue in a case with such a scant Record and in such an ambiguous posture. Disposition by this Court of the instant §§ 1988 case would have a

very broad impact. The caselaw on fee shifting provisions has developed by courts liberally borrowing theories and rules of recovery from one fee shifting provision to apply to other, similar provisions. See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S.Ct. 3078 (1987) (Clean Air Act); Marek v. Chesny, 473 U.S. 1, 14, 43 (1985) (Brennan, J., dissenting) (collecting over 100 fee shifting provisions); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980) (comparing Title VII to §§ 1988); Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984) ("age discrimination cases commonly cite section 1988 cases on fee questions"); Jordan, 691 F.2d 514 (Freedom of Information Act). Any action in this

area of the law by this Court should be founded on more than an ambiguous statement by a panel aberrational even from its own Circuit's prior holdings.[2]

Whether or not this Court upholds the panel's decision that contingency fee agreements do serve as an automatic cap on statutory fees, the issue of fees for legal support personnel would not be affected. If this Court were to affirm the panel below on the contingency fee

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2. See, e.g., Richardson v. Byrd, 709 F.2d 1016, 1023 (5th Cir.), cert. denied, 464 U.S. 1009 (1983); Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982) ("paralegal expenses are not 'costs' within the meaning of Rule 54(d) [but] are separately recoverable only as part of a prevailing party's award for attorney's fees"); Jones v. Armstrong Cork Co., 630 F.2d 324, 325 n.1 (5th Cir. 1980). See also Concorde Limousines, 835 F.2d at 547 n.25 (Wisdom, J.).

agreement issue, there would be no need to address the issue of separate compensation for legal support personnel. If the Court reverses the decision below, Amici respectfully urge that the case be remanded to the Court of Appeals for the Fifth Circuit so that a concrete Record may be developed on this and other issues. Cf. Delaware Valley Citizens' Council, 107 S.Ct. at 3089-91 (O'Connor, J., concurring in the judgment) (district court must examine relevant legal market in awarding fees). Postponement of adjudication of this issue until properly developed would be entirely consistent with the prudential concerns repeatedly expressed by this Court. See City of Springfield v. Kibbe, 107 S.Ct. 1114, 1116 (1987) (dismissing writ of certiorari as

improvidently granted); City of Riverside v. Rivera, 477 U.S. 561, 581 (1986) (Powell, J., concurring).

B. The Award of Fees for Legal Support Personnel is in Accordance with Legislative History and Well-Established Caselaw Under § 1988 and Other Fee Shifting Provisions.

If this Court decides to rule on the issue of separate compensation for legal support personnel, Amici respectfully suggest that there can be but one conclusion -- that separate compensation is necessary to meet the goals of § 1988 and the underlying civil rights laws.

The Report of the Senate Judiciary Committee which accompanied the passage of the Civil Rights Attorney's Fees Awards Act of 1976 stated plainly: "In

computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'." Senate Report, p.6 (citation omitted).

Separate compensation for non-lawyers who have some legal training (e.g. paralegals, law clerks, law students) is an "increasingly widespread custom" in the legal community. Ramos v. Lamm, 713 F.2d 546, 558-59 (10th Cir. 1983).[3] For example, it is well-known that private law firms hire

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3. This Court has recognized that custom in its exercise of original jurisdiction, by awarding such separate compensation for support personnel to its Special Masters. See, e.g., South Carolina v. Baker, 108 S. Ct. 279 (1987). See also Louisiana v. Mississippi, 466 U.S. 921 (1984) (Burger, C.J., dissenting).

law students as summer associates. The time spent on a legal matter by these "associates" is, of course, billed to the firm's fee-paying clients. Increasingly, law students also are employed and their time billed, during the academic year, by private law firms of all sizes. Both practices serve the legal profession's need for an apprenticeship program.

As noted by Petitioner, many courts have either explicitly addressed the desirability of separate billing or have, by awarding such fees, implicitly endorsed them. See Brief for Petitioner 16-17, 19. In those few civil rights cases where fees for legal support personnel have been denied, the courts have not found such awards to be

per se unreasonable. Rather, the courts have determined that other factors militated against such an award in particular cases.[4]

Indeed, even the rationale of the few cases that disallow support personnel fees -- that those fees are built into the particular attorney's high hourly billing rate -- has been

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4. See, e.g., Abrams v. Baylor College of Medicine, 805 F.2d 528, 535 (5th Cir. 1986) ("the cost of the services of support personnel -- such as paralegals -- was encompassed within the relatively high hourly billing rate awarded for the time of the plaintiffs' attorneys"); Lamphere v. Brown University, 610 F.2d 46, 48 (1st Cir. 1979) (denying additional fees to attorneys beyond what paralegals had already received from attorneys as payment in the case); Roe v. City of Chicago, 586 F. Supp. 513 (N.D. Ill. 1984) (included in attorney's billing rates).

criticized:

> It is impossible to believe that Congress would have wanted prevailing parties to get back their lawyers' . . . expenses . . . which are included in overhead and therefore billed as part of the lawyer's hourly rate . . . but not the expenses . . . often billed separately to the client.

Henry v. Webermeier, 738 F.2d 188, 192 (7th Cir. 1984) (Posner, J.).

C. Separate Billing for Legal Support Personnel Keeps the Level of Fee Awards Reasonable, and is Especially Necessary in Civil Rights Litigation.

As noted above, separate compensation for legal support personnel is widespread throughout the legal profession. Much of the work involved in providing effective legal representation can be, and is, performed not by lawyers but by personnel with specialized legal training: law students

in clinical education programs; law clerks, in both legal service organizations and private law firms; and paralegals, who do time-consuming, but vital, legal research, investigation, and factual development. Separate billing is a responsible billing practice which keeps down the costs of legal representation, both for the traditional fee-paying client and for clients who hope to utilize fee shifting provisions in pursuing their claims.

The Fifth Circuit itself has specifically addressed the issue of separate compensation for legal support personnel, in the very case on which the panel below relied -- Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The Fifth Circuit stated:

> It is appropriate to distinguish between legal work, in the strict

> sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate.

Id. at 717 (emphasis added). Johnson recognized (as have many other cases since) that litigation involves many tasks which need not be performed by an attorney, but which nevertheless must be performed. These tasks, of course, are to be compensated at lesser rates, as Johnson suggests, and as other cases have required. This separate compensation, however, does constitute "fees" within the meaning of §§ 1988. The use of support personnel "is to be encouraged by separate compensation in order to reduce the time of more expensive counsel." Jacobs v. Mancuso,

825 F.2d 559, 563 (1st Cir. 1987). See also Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983).

This Court has cautioned with respect to fee shifting provisions: "'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'" Hensley v. Eckerhart, 461 U.S. 424, 434 (1983), quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original). See also City of Riverside v. Rivera, 477 U.S. 561, 591 (186) (Rehnquist, J., dissenting) (statutory fees must be determined according to "the traditional

billing practices in the profession [and as] a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys").

Separate compensation for legal support personnel is a "traditional billing practice," and is regularly utilized by private law firms with their fee-paying clients. This reasonable practice helps reduce the cost of legal representation for all concerned, including defendants who must pay under statutory fee shifting provisions, including §§ 1988. Congress plainly intended that civil rights plaintiffs utilize the private bar (with its normal billing practices). Fee shifting provisions enable "vigorous enforcement of modern civil rights legislation, while at the same time limiting the

growth of the enforcement bureaucracy." Senate Report, p.4.

Civil rights cases often are quite complicated. The Senate Judiciary Committee compared civil rights actions to "other types of equally complex Federal litigation, such as antitrust." Senate Report, p. 6. Separate compensation in such complex litigation is an exercise of sound billing judgment which reduces the overall cost of effective legal representation. It serves the mandates of §§ 1988 and of this Court extremely well.

Furthermore, the use of legal support personnel is, in many instances, necessary, for the continuing existence of nonprofit legal assistance or legal defense organizations. Public interest groups, nonprofit law firms, and legal

services organizations, with their lower salary scales for attorneys, too often are understaffed. Caseloads often are extremely high. The use of attorneys to perform paralegal or clerking tasks is a poor use of limited professional time. "The employment of [support personnel] therefore serve[s] an economically efficient purpose, allowing counsel more time to pursue traditional strict legal work." Garmong v. Montgomery County, 668 F. Supp. 1000, 1011 (S.D. Tex. 1987). Legal support personnel are fundamental if those entities are to continue their important work.

The clinical education programs at the Nation's law schools, by definition, also require the use of other non-lawyers -- law students. There are dozens of clinical education programs

utilizing (and teaching) law students in actual litigation. The monies generated by statutory fees often are essential to the provision of clinical training and to the continued development of the civil rights bar. Fee awards to clinical programs

> may promote the availability of lower-cost representation, with salutary effects on the burden of fee awards, on statutory efforts to remove barriers to litigation of meritorious claims, and on the market forces encouraging settlement in appropriate cases, as well as on the quality of legal education.

Jordan v. United States Dep't of Justice, 691 F.2d 514, 524 (D.C. Cir. 1982). See also DiGennaro v. Bowen, 666 F. Supp. 426, 432 (E.D.N.Y. 1987) ("This court has acknowledged 'that students in a clinical program recognized by this circuit are entitled to an award in

appropriate circumstances'.").

Congress' intent in enacting § 1988 is clear -- fee awards should be calculated according to "market rates" for attorneys engaged in traditional, complicated federal litigation. In Blum v. Stenson, 465 U.S. 886, 893-96 (1984), this Court determined that nonprofit law firms and public interest legal organizations should not be treated differently for purposes of calculating fee awards. In Blum, this Court specifically rejected the contention of the U.S. Solicitor General that statutory fees should be calculated on an "actual cost" basis. Id. at 892-93, 895-96. Nor should these firms and organizations be penalized for their reliance on practices common in the traditional bar -- the use of, and

separate compensation for, legal support personnel.

The hourly rates for attorneys in public interest groups are to be measured against the "market" for traditional, for-profit law firms. The billing practices of public interest groups <u>also</u> should be measured by the legal profession's common billing practices, which include separate compensation for legal support personnel.

CONCLUSION

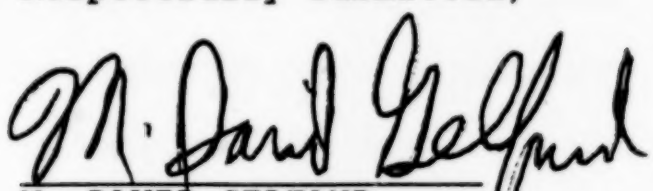
The panel's decision in the instant case is contrary to the mandates of this Court, is radically divergent from decisions of the other Courts of Appeals, and ill serves the public policy considerations underlying 42

U.S.C. §§ 1988. A contingency fee agreement should not automatically determine the level of fee that is reasonable under §§ 1988; rather, courts should apply the factors approved by Congress when it passed §§ 1988. Furthermore, separate compensation for legal support personnel is a traditional practice in the legal profession, maximizes the use of often-limited professional time, and reduces the cost of civil rights litigation.

For the above reasons, Amici, in support of Petitioner Blanchard, urge this Court to reverse the decision of the Fifth Circuit, and remand for

further proceedings consistent with this Court's instructions.

Respectfully submitted,



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The assistance provided by Alec Chang is gratefully acknowledged.

(5)

No. 87-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR J. BLANCHARD,

Petitioner,

v.

JAMES BERGERON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONER FOR AMICI CURIAE FARNSWORTH, SAPERSTEIN & SELIGMAN, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, CENTER FOR LAW IN THE PUBLIC INTEREST, CALIFORNIA TRIAL LAWYERS' ASSOCIATION, EQUAL RIGHTS ADVOCATES

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QUESTIONS PRESENTED

Should statutory awards of attorney's fees be calculated under the congressionally sanctioned lodestar/multiplier approach and not limited by the terms of a private contract between a civil rights plaintiff and his or her counsel?

Should the courts follow the practice in the private marketplace and compensate counsel for time spent by paralegals and law clerks in order to encourage economical and efficient staffing of civil rights cases?

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INTEREST OF AMICI CURIAE[1]

Amici Curiae represent an array of public interest, civil rights and trial lawyers' organizations who are dependent on statutory awards of attorney's fees in order to pursue their civil rights and public interest litigation. Taken together, amici have

[1] The parties have consented to the filing of this brief, and their letters of consent will be filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

litigated hundreds of attorney's fees applications in precedent setting public interest and civil rights cases. The amici are:

Farnsworth, Saperstein & Seligman, P.C., Oakland, California

This sixteen year old, sixteen-lawyer firm specializes in plaintiffs' employment discrimination litigation, both individual and class actions. The firm employs seven full time paralegals. Compensation in all class action and most individual litigation is based upon statutory awards of attorney's fees because plaintiffs usually lack the resources to pay the firm during litigation. Contingent fee agreements with individual clients frequently require no payment during the course of the litigation.

The firm regularly uses paralegals to increase its efficiency and thousands of paralegal hours are expended in the firm's Title VII class action cases. The firm's paralegals perform critical tasks such as shepardizing briefs, locating and interviewing class members and witnesses, summarizing testimony and depositions and indexing and managing documents. These tasks previously were handled by legal associates.

In addition to representing themselves in their own civil rights attorney's fees litigation, the firm represents many non-profit organizations and private practitioners in their attorney's fees litigation. In the course of attorney's fees litigation the firm has gathered evidence on how the prevailing legal market in Northern California bills for paralegal and law clerk time. All attorneys deposed on this issue have testified that they bill on an hourly rate basis for paralegal and law clerk time.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. MALDEF, like other civil rights organizations relies on court awards of attorney's fees as a means of

providing legal services to Hispanics whose civil rights have been denied. With offices throughout the West and Southwest, MALDEF regularly handles intake and referral of civil rights cases, which are exceedingly difficult to refer to private counsel on a contingent fee basis.

MALDEF has an extensive voting rights and employment discrimination litigation docket and regularly makes use of paralegals and law clerks to perform research and factual investigation.

Center for Law in the Public Interest, Los Angeles, California

The Center for Law in the Public Interest (CLIPI) is a non-profit public interest law firm. Although initially funded by foundation grants, over the years the Center's primary funding source has become court awarded attorney's fees which are used to fund the Center's public interest litigation which includes employment discrimination and environmental cases. Attorneys, who had previously worked in large Los Angeles law firms, founded the Center. These attorneys utilize paralegals extensively in the same way they did while working in the private sector.

California Trial Lawyers' Association

The California Trial Lawyers' Association (CTLA) is a statewide organization of plaintiffs' trial attorneys. CTLA's approximately 6,000 attorney members derive legal fees from contingency fee cases and from court awarded statutory fees. CTLA's members make extensive use of paralegals, particularly to assist in large scale massive document cases such as complex business and tort litigation.

Equal Rights Advocates, Inc., San Francisco California

Equal Rights Advocates, Inc. (ERA) is a non-profit public interest law firm dedicated to achieving equality of rights under

the law for women. ERA litigates a number of sex discrimination cases under Title VII of the Civil Rights Act of 1964, and uses paralegals and law clerks to staff cases in the most economical manner possible.

SUMMARY OF ARGUMENT

The amici submitting this brief are private practitioners and non-profit public interest organizations that are litigating hundreds of civil rights cases. Unless fee awards are available at market rates, the congressional goal of enabling clients to find competent lawyers needed to enforce civil rights legislation will be frustrated. The already severely diminishing number of attorneys willing or able to handle such cases would decrease even further. The contents of fee agreements are already subject to regulation under state statutes and are often restricted by state and local bar association rules. Regulation of fee contracts by the federal courts is not contemplated by the legislative history of Title VII's attorney's fee provision, 42 U.S.C. §§ 2000e-5(a), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, and is not necessary.

For amici, it is important to conserve their limited financial resources by staffing cases in the most economical and efficient manner possible. This can require extensive use of paralegal and law clerk time. Private practitioners routinely bill such time to fee paying clients and such marketplace practices are incorporated by the decisions of this Court. The efficient and economical delivery of legal services is supported by encompassing the use of paralegals. Refusal to award rates prevailing in the legal marketplace for such services would discourage their use by civil rights attorneys and create a dual bar—one which bills a market rate for paralegals, and the other which can only recover costs for such services.

ARGUMENT

I. A REASONABLE ATTORNEY'S FEE SHOULD BE CALCULATED UNDER THE LODESTAR/MULTIPLIER APPROACH AND NOT LIMITED BY THE TERMS OF A PRIVATE CONTRACT

The legislative history of 42 USC § 1988 establishes that the amount or terms of a contingent fee contract does not limit the calculation of a reasonable statutory fee. In addition, the recent attorney's fees decisions of this Court establish two principles relevant to the fee contract issue. First, fees must be sufficient to attract competent counsel to accept meritorious civil rights cases. Second, fees must not be calculated in a manner that yields arbitrary or capricious results. The use of the private fee contract as a cap violates both of these important principles.

A. A Private Fee Contract Does Not Limit The Calculation Of A Statutory Fee

It is firmly established that the proper method for calculating a "reasonable attorney's fee" is the lodestar/multiplier approach.[2] The legislative history of the Civil Rights Attorney's Fees Awards Act evidences Congress' clear intent to exclude from the statutory fee calculation the terms of the private fee arrangement.

The twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are identified by Congress as the "appropriate standards" for a civil rights fee award.[3] Significantly, the Court in *Johnson* specifically rejected the interpretation of the Fifth Circuit in this case and stated that whether or not a client "agreed to pay a fee and in what amount is not decisive."[4]

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[2] *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983); *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

[3] *Blum v. Stenson*, 465 U.S. 886, 893-4 (1984) (quoting with approval (S. Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. Admin. News 1976, pp. 5908, 5913.)

[4] *Id.* at 718 (quoting with approval from *Clark v. American Marine Corp.*, 320 F.Supp. 709, 711 (E.D. La.), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

Congress' intent to exclude the fee agreement with counsel from the calculation of a reasonable statutory fee is also clear from an examination of the three cases where the fees standards were "correctly applied." *Blum, supra.*

In *Stanford Daily v. Zurcher,* 64 FRD 680 (N.D. Cal. 1974), the plaintiffs had a fee agreement that they would pay counsel "$5,000 plus whatever funds they could raise from interested third parties." *Id.* at 686. Pursuant to this fee contract counsel was paid $8,500. The Court awarded a total fee of $47,500. *Id.* at 688.

Similarly, in *Davis v. County of Los Angeles,* 8 EPD ¶ 9444 (C.D. Cal. 1974), plaintiffs were represented by the Los Angeles based Center For Law In The Public Interest (CLIPI), *amicus* herein. As a non-profit public interest law firm the Center's clients were not obligated to pay any fee to CLIPI. The Court held that the fact that CLIPI was such an organization was "not legally relevant." Had Congress intended for fees to be governed by fee agreements with counsel, it would not have cited with approval a case where an award of $60,000 was made to an organization with no right to contract for fees with a client.

In the final case cited by Congress, *Swann v. Charlotte-Mecklenberg Bd. of Education,* 66 FRD 483 (W.D. N.C. 1975), counsel for the plaintiffs were reimbursed out-of-pocket expenses and some nominal compensation by the NAACP Legal Defense and Educational Fund, Inc. *Id.* at 486. The Court held these fee arrangements were irrelevant, noting that "in other civil rights cases where counsel fees have been awarded, the courts have held that reasonable fees should be granted regardless of whether the individual plaintiffs were obligated to pay any fees. . . ." *Id.*

If Congress had desired a percentage or dollar amount "cap" on civil rights attorney's fees, it could have included it as it has done in numerous other fees statutes.[5] The absence of such a provision further demonstrates that "reasonable" statutory fees are intended to differ from fees that are the products of traditional percentage fee agreements.

[5] *See, e.g.,* 28 U.S.C. 2412(d)(1)(A) [fee awards under EAJA limited to $75/hour in absence of special circumstances); Federal Tort Claims Act, 28 U.S.C. § 2678 [fee limited to 20% of administrative settlement; 25% of judgment or settlement]; Social Security Act, 42 U.S.C. § 406(a) [fee limited to 25% of award]; Indian Claims Commission Act, 25 U.S.C. § 70 (1976) (10% of recovery).

B. Using A Fee Contract As A Limit On Statutory Fees Frustrates Congress' Purpose Of Encouraging Attorneys To Accept Meritorious Civil Rights Cases

The use of a contingent fee agreement as a cap on fees does not comport with the aim of the civil rights fee shifting statutes, which seek to provide an incentive for attorneys to represent clients with meritorious civil rights actions.[6] This fundamental Congressional purpose has been repeatedly recognized by this Court.[7]

Allowing a percentage recovery to serve as a "cap" on a statutory fee award would decrease the already limited number of attorneys willing to represent civil rights plaintiffs.[8] Because civil rights cases frequently involve primarily injunctive, non-monetary relief[9], and frequently involve limited damages recovery[10] a contractual contingent fee cap severely limits the

[6] *See generally* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1, *reprinted in* U.S. Code Cong. & Ad. News 1976, 5908.

[7] *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976)."); *Blum v. Stenson,* 465 U.S. 886, 897 (1984) ("The legislative history [of § 1988] explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.' S. Rep. No. 94-1011, p. 6 (1976)."); *City of Riverside v. Rivera,* 477 U.S. 561, 576 (1986) ("Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.")

[8] *See generally* Comment, *Attorney's Fees in Civil Rights Cases: Contingent Fee Awards Under Section 1988,* 17 Pac. L.J. 1275 (1986).

[9] *See Rivera, supra,* 477 U.S. at 575 ("because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief. Rather, Congress made it clear that it 'intended that the amount of fees . . *not be reduced because the rights involved may be non-pecuniary in nature.*' " (quoting S. Rep. No. 94-1011, p. 6 (1976) (emphasis added by Supreme Court)

[10] In addition to the special problems and defenses in civil rights actions against public entities noted in *Rivera,* it should be emphasized that civil rights recoveries are statutorily limited, such as under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, where neither emotional distress nor punitive damages may be recovered.

attorney's fee award, as illustrated by the instant case where counsel was awarded only $4,000 in fees even though he won the case after a jury trial. The existing difficulty of finding counsel to accept civil rights cases is well documented in the case law.[11] Limiting attorneys to the cap created by a private contractual agreement would discourage representation of the poor, who can only obtain private counsel on a contingent fee basis.

Thus, members of this Court have correctly noted on numerous occasions that private sector fee agreements or percentage recoveries are inappropriate standards for calculation of civil rights attorney's fees awards.[12] Indeed, in enacting § 1988, Congress specifically noted that civil rights cases are not competitive in the legal marketplace, stating "the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Rivera,* 477 U.S. 561, 576 (1986) (citing House Report at 3). A fee agreement with a civil rights client, who is typically unable to afford legal services, addresses the attorney's relationship with the client, not the attorney's market expectation. The contingent fee contract with the client does not replace the court's determination of a "reasonable" fee because the court's award is based on a determination made after a victory on the merits. The court's award of reasonable

[11] For example in *Bradshaw v. United States District Court,* 742 F.2d 515 (9th Cir. 1984) (Bradshaw III), the district court strove for over 13 months to find an attorney to represent plaintiff. "Chief among the reasons given by attorneys and organizations contacted was the lack of compensation. Besides the obvious demand on attorney time for the adequate prosecution of a complex employment discrimination case, the costs of discovery were thought prohibitive." *Id.* at 516.

[12] *See City of Riverside v. Rivera,* 477 U.S. 561, 578 n.9 (1986) ("while private market considerations are not irrelevant, Congress clearly rejected the notion that attorney's fees under § 1988 should be based on private sector fee agreements."); *Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984) (rejecting suggestion that civil rights fee awards be calculated on a percentage of recovery basis, as in "common fund doctrine" cases); *Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. _____, 107 S.Ct. 3078, 3089-3090 (1987) (O'Connor, J. concurring) (private market percentage of recovery model provides "very little guidance"); *Id.* at 3099 (Blackmun, J., dissenting) ("There is no reason to grant a defendant a 'windfall' by excusing payment of attorney's fees simply because a plaintiff has entered into a contingent fee contract.")

fees utilizes hindsight and can account for factors unexpected at the outset of a case such as a change in law or the unusually vigorous defense of a case. The reasoning in this Court's opinions in *Rivera, Blum* and *Delaware Valley II,* the unambiguous legislative history, and the congressional purpose in enacting the fee shifting statutes require reversal of the opinion by the Fifth Circuit below.

C. Use of the Terms of a Fee Contract as a Cap on Statutory Fees Would Yield Capricious and Inconsistent Results

Use of a contractual fee agreement as a "cap" would result in inconsistent and capricious fee awards in civil rights cases. For example, two different attorneys could perform the same work on the same case but because one attorney had a 30% fee agreement and another had a 20% fee agreement they would receive different amounts, thus potentially producing a "windfall" to the defendant who violated the civil rights laws.

Or, if the client received only injunctive relief—as occurred in each of the three cases[13] where Congress found the courts had "properly applied" the § 1988 fee factors—use of a contingent fee agreement could produce *no* statutory fee award.

Such arbitrary standards for fee awards would discourage attorneys from accepting civil rights cases[14] and would violate Congress' directive to provide a "reasonable" fee.

D. Remaining Issues Regarding Contingent Fee Contracts Should Be Left For The States To Regulate In The First Instance

Any remaining issues regarding contingent fee contracts should be resolved in the first instance by state or local regulatory authorities. A considerable regulatory system exists nationwide and includes state statutory provisions, state con-

[13] *Swann, Davis* and *Stanford Daily* were cases where only injunctive relief was recovered.

[14] *See* Comment, *Attorney's Fees Awards in Civil Rights Cases: Contingent Fee Awards Under Section 1988,* 17 Pac. L.J. 1272 (1986).

tract law and state disciplinary bodies.[15] This includes the ABA Model Rules of Professional Conduct, Rule 1.5 ("Fees") (1983), the ABA Model Code of Professional Responsibility DR 1-106 ("Fees for Legal Services") (1981), and state rules of professional conduct, such as California's Business and Professions Code, § 6000 *et seq.*, and the California State Bar Rules of Professional Responsibility. In addition, numerous local agencies such as state and county bar associations have fee arbitration panels which routinely regulate attorney-client fee disputes.[16]

II. CONSISTENCY WITH MARKETPLACE STANDARDS REPEATEDLY APPROVED BY THIS COURT REQUIRES COMPENSATION FOR LAW CLERK AND PARALEGAL TIME

The Fifth Circuit's opinion in this case did not expressly address compensation for paralegal and law clerk hours, but simply held such hours were not compensable due to the contingent fee contract. *Blanchard v. Bergeron,* 831 F.2d 563, 564 (5th Cir. 1987). Thus it is unnecessary for the Court to

[15] *See generally Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come,* 14 Toledo L.Rev. 1205 (1983).

[16] *Id.* at 1226 n. 104. These include:

Alaska Bar R. 35-42; Rules of Comm. of the State Bar of Ariz. on Arbitration of Fee Disputes; By-Laws of the Legal Fee Arbitration Comm. of the Bar Ass'n of Greater Cleveland and the Rules and Regulations of its Legal Fee Arbitration Bd.; Rules for Arbitration for Legal Disputes, Conn. Bar Ass'n; Rules of the Fee Dispute Comm. of the Dallas Bar Ass'n; Model Fee Arbitration Bylaws, as adopted by the Fla. Bar Ass'n; State Bar of Ga.'s Fee Arbitration R.; Rules of the Idaho State Bar on Arbitration of Fee Disputes; Rules for the Arbitration Comm., as approved by the Iowa State Bar; Mich. Gen. CT. R. 979; Legal Fee Arbitration Plan, as adopted by the Ky. Bar Ass'n; Resolution of Fee Disputes, N.H. Bar Ass'n; N.J. Ct. R. 1:20A; Section 739, By-Laws of the Philadelphia Bar Ass'n Rules to the Fee Dispute Comm. of the Philadelphia Bar Ass'n; Procedures of the Legal Fee Arbitration Bd. of the Minn. State Bar; Rules of the Comm. on Resolution of Fee Disputes, the Bar Ass'n of Metropolitan St. Louis; Fee Arbitration Rules, as adopted by the State Bar of Wis.; Cal. Bus. & Prof. Code § 6200 *et. seq.;* Rules of Procedure for the Hearing of Fee Arbitration by the Alameda County Bar Ass'n; Rules for Arbitration Proceedings for Attorney Fee Disputes, Beverly Hills Bar Ass'n; Rules for Conduct of Fee Disputes and Other Related Matters, Los Angeles County Bar Ass'n; Rules of Conduct of Fee Arbitrations by the Fee Arbitration Comm. of the Santa Clara County Bar Ass'n; San Diego County Bar Ass'n Rules of the Arbitration Comm.

examine the paralegal and law clerk issue. If, however, the Court considers this question, *amici* urge that compensation for such hours be awarded.

The "reasonable attorney's fee" awards mandated by such Civil Rights statutes as 42 U.S.C. § 1988 would be inadequate and inconsistent with standards in the legal marketplace if they did not compensate for time spent by paralegals and law clerks. The policy of enabling plaintiffs' counsel to conduct civil rights litigation in the most efficient and economical fashion would be frustrated if statutory fees did not compensate for paralegal and law clerk hours.

A. Courts and Lawyers Routinely Include Compensation For Paralegal and Law Clerk Time in Attorney's Fees Awards

The current practice in the legal marketplace, followed in court awards of attorneys' fees, is to provide compensation for work performed by paralegals and law clerks.[17] Congress, in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, cited with approval *Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), as one of the cases in which the factors for calculating an attorney's fees award were "correctly applied." S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913. *Davis* has been repeatedly cited with approval by this Court. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 431 (1983); *Blum v. Stenson,* 465 U.S. 886, 893-4; *City of Riverside v. Rivera,* 477 U.S. 561 (1986).

In *Davis,* plaintiffs sought compensation for "967 hours of statistical analysis, legal research, transcript summarization, interviewing, and general assistance carried out by a law clerk

[17] *See, e.g., Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985); *Alter Financial Corp. v. Citizens & Southern Int'l Bank,* 817 F.2d 349 (5th Cir. 1987) (awarding paralegal and law clerk time under Fed. R. App. P. 38 for frivolous appeal); *Lamphere v. Brown University,* 610 F.2d 46 (1st Cir. 1979); *Aumiller v. University of Delaware,* 455 F. Supp. 676 (D. Del.), *aff'd mem.* 594 F.2d 854 (3d Cir. 1979); *Chisholm v. United States Postal Service,* 516 F. Supp. 810 (W.D.N.C.), *aff'd in part, vacated in part on other grounds,* 665 F.2d 482 (4th Cir. 1981); *Suzuki v. Yuen,* 678 F.2d 761 (9th Cir. 1982).

and a paralegal assistant." *Id.* at p. 5048 All requested paralegal and law clerk hours were compensated. *Id.* Similarly, this Court affirmed an award under § 1988 which included compensation for 84.5 law clerk hours. *Rivera, supra,* 477 U.S. at 565. This Court cited with approval market evidence on law clerk billing, noting the district court's finding that " 'the rate of $25 per hour . . . [for] law clerks, was lower than the customary hourly rate for such services.' " *Id.,* at 566 n.2.

Awards for time spent by paralegals and law clerks are also required if civil rights attorneys' fees awards are to be consistent with the billing practices in the private marketplace. The use of the prevailing marketplace as the critical standard in calculating awards of attorney's fees has been repeatedly emphasized by this Court. *See, e.g., Blum v. Stenson, supra; Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. ____, 107 S.Ct. 3078, 3089 (1987) (O'Connor, J. concurring).[18] In *Blum,* this Court explicitly rejected the proposition that attorneys should be billed on a "cost" or "cost-plus" basis and held that a reasonable fee is to be determined by fees charged in the prevailing legal market. The published opinions in the area of discovery in attorney's fees cases demonstrate that paralegal and law clerk hours are billed on an hourly basis in the legal marketplace.[19] And, in adopting a new Bankruptcy Code in 1978, 11 U.S.C. § 330, Congress specifically noted the practice in the legal marketplace of billing for paralegal hours. The House Report states, "In nonbankruptcy areas, attorneys

[18] Because *Delaware Valley II* was decided by a split Court, Justice O'Connor's concurrence should be treated as the opinion of the Court. *See Marks v. United States,* 430 U.S. 188, 193 (1977) (in the absence of a majority opinion, the opinion which provides the narrowest rationale for the Supreme Court's decision constitutes the Court's holding in the case); *see also Thompson v. Kennickell,* 836 F.2d 616 (D.C. Cir. 1988) (treating O'Connor concurrence as controlling opinion in *Delaware Valley II); Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987), *cert. denied,* ____U.S.____, 108 S.Ct. 752 (1988); *Catlett v. Missouri Highway and Transportation Committee,* 828 F.2d 1260 (8th Cir. 1987), *cert. denied,* ____U.S.____, 108 S.Ct. 1574 (1988).

[19] *See, e.g., Real v. Continental Group,* 653 F. Supp. 736 (N.D. Cal. 1987) (finding that most law firms in the San Francisco Bay Area charge $65 per hour for paralegals); *Ruiz v. Estelle,* 553 F. Supp. 567, 589 (S.D. Tex. 1982) (noting that defendants paid their private counsel $35 per hour for paralegal work).

are able to charge for a paraprofessional's time on an hourly basis, and not include it in overhead. If a similar practice does not pertain in bankruptcy cases then the attorney will be less inclined to use paraprofessionals even where the work involved could easily be handled by an attorney's assistant." H.R. Rep. No. 95-595, 95 Cong., 1st Sess., p. 329, 330 (1977).

B. The Policy of Encouraging Efficient and Economical Staffing of Civil Rights Cases Is Furthered By Allowing Compensation for Paralegal and Law Clerk Time

The policy concerns expressed by Congress in the Bankruptcy Act are fully applicable to the attorney's fees provisions of the Civil Rights Acts. As recognized by the 7th Circuit, the use of paralegals "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying the civil rights statutes."[20]

Permitting civil rights attorneys to bill for the use of paralegals and law clerks on the same basis as the legal marketplace encourages their use. If civil rights attorneys could not be compensated for paralegals and law clerks on an hourly rate basis, two results would occur: (1) civil rights attorneys would be discouraged from using paralegals and would tend to use associate attorneys, at higher billing rates, to do work which could be performed by paralegals and law clerks at lesser rates; and, (2) civil rights attorneys would actually lose money on the use of paralegals and law clerks because they would not recover interest on the overhead costs of paralegals and law clerks. The effect would be a dual bar in the civil rights field: attorneys who defend civil rights cases would continue to bill for paralegals and law clerks at market hourly rates while plaintiff civil rights attorneys would be discouraged from using them. There is no support in the legislative history to support such a dual-standard bar and no reason to create it.[21]

[20] *Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985).

[21] Compensation for law clerk hours also furthers Congress' goal of providing representation for civil rights clients. *See* Comment, *Court Awarded Attorneys' Fees in Recognition of Student Lawyering,* 130 U. Pa L. Rev. 161 (1981).

CONCLUSION

Limiting statutory fees by private contracts would mean that the very cases where fees are most critical—cases involving poor clients or violations of civil rights where little or no monetary recovery is likely—would go unprosecuted. This result is inconsistent with Congress' intent in providing fee shifting provisions and could yield inconsistent and capricious fee awards.

Civil rights and public interest attorneys, such as *amici,* should be encouraged and allowed to staff cases in an efficient and economical manner by using paralegals and law clerks. Reasonable compensation for law clerk and paralegal time is consistent with the practices in the legal marketplace and is supportive of cost effective case management.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC., AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

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STATEMENT

The National Association of Legal Assistants, Inc. submits this brief *amicus curiae,* pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of petitioner. This brief is submitted upon the written consent of petitioner and respondents.[1]

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INTEREST OF THE AMICUS CURIAE

> "Legal assistants[2] are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney." National Association of Legal Assistants, Inc., Model Standards and Guidelines for Utilization of Legal Assistants (1984).

The National Association of Legal Assistants, Inc. ("NALA") was incorporated in 1975 as a non-profit or-

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[1] The original of petitioner's written consent by William W. Rosen, Esquire, counsel for petitioner, and the original of respondent's written consent by Edmond L. Guidry, III, Esquire, counsel for respondents, are being filed with the Clerk of the Court herewith.

[2] The term "legal assistant" is preferred, as it represents those persons doing work of a legal nature under the direct supervision of an attorney, as opposed to a broader category of persons termed "paralegal," who perform work of a similar nature but not necessarily under the supervision of an attorney.

ganization, in recognition of and response to the burgeoning use of legal assistants in the delivery of legal services throughout the United States. Representing some 8,000 legal assistants through individual membership or affiliated associations, NALA seeks to promote professional development and continuing education for legal assistants, and to provide a strong national voice to represent this growing and significant profession.[3]

Consistent with these goals, NALA, in 1975, adopted a Code of Ethics and Professional Responsibility for legal assistants to serve as a guideline for the proper conduct by legal assistants in the performance of their duties (reprinted in full in the Appendix to this brief). In 1976, NALA administered the first national legal assistant certification examination, testing skills basic to the profession as well as substantive knowledge of law and procedure. Currently, the voluntary two-day examination program is administered three times yearly. As of March 1988, 2,267 participants have earned the title CLA (Certified Legal Assistant).

In 1984, NALA adopted its Model Standards and Guidelines for Utilization of Legal Assistants to serve as a guide for legal assistants and supervising attorneys, by describing the role of a legal assistant in the delivery of legal services. Finally, NALA works hand in hand with local, state and national bar associations to set standards for legal assistants, and provides continuing education for

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[3] Projections by the United States Department of Labor indicate an increase in the number of legal assistants from an estimated 53,000 in 1984 to 104,000 in 1995. United States Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Quarterly (Spring 1986).

legal assistants through seminars, workshops, publications and video tapes.

The legal assistant is a recognized and desirable addition to the modern law office. The delegation of work which would otherwise be performed by an attorney to a skilled legal assistant reduces the cost of legal services to the client and increases attorney efficiency and productivity. The benefits of this cost-reducing, cost-effective delivery of legal services to the public through the attorney-supervised use of legal assistants will be promoted and encouraged if the work of legal assistants is recognized and compensated by attorney's fee awards.

Were the Court to affirm the ruling below by holding that the time spent by legal assistants in the successful prosecution of a civil rights case should not be considered as compensable under 42 U.S.C. § 1988, the detrimental effect upon those seeking legal representation to redress civil rights violations, as well as in other types of cases in which Congress has provided for the recovery of attorney's fees, would be substantial. Such a result would either discourage attorneys from representing victims of civil rights violations, because they could not receive full compensation for their effort, or force attorneys to perform all tasks of a legal nature, thereby decreasing the utilization of legal assistants and increasing the cost of litigation.

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SUMMARY OF ARGUMENT

The widespread use of legal assistants by attorneys to perform work of a legal nature which would otherwise have to be performed by an attorney at a much higher rate has significantly reduced the cost of legal services to the public and enhanced the quality of legal representation by promoting efficient utilization of attorney time. Compensation for the attorney-supervised work of legal assistants at an hourly rate less than that charged by attorneys is regularly included in attorney's fees charged private fee-paying clients.

A reasonable attorney's fee awarded pursuant to the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, should include compensation for productive work of a legal nature performed by a skilled legal assistant, under the supervision of an attorney, in order to effectuate the purpose of section 1988. Section 1988 was adopted by Congress to make available legal representation to victims of civil rights violations by fully compensating counsel for prevailing parties at a rate competitive with that charged in the private marketplace. An attorney's fee award which includes compensation for the work of legal assistants is competitive with fees charged to traditional fee-paying clients, makes civil rights representation financially feasible for competent attorneys, promotes the cost-effective practice of utilizing legal assistants in the delivery of legal services and is in accord with the goal of making available efficient and reasonably priced legal services, not only to victims of civil rights violations but also to the public at large.

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ARGUMENT

THE WORK OF LEGAL ASSISTANTS IS COMPENSABLE AS PART OF A REASONABLE ATTORNEY'S FEE AWARD PURSUANT TO 42 U.S.C. § 1988.

A. Compensating prevailing parties for the work performed by legal assistants comports with accepted practice in the private marketplace and is thus consistent with the purpose of 42 U.S.C. § 1988.

The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." On several occasions, the Court has visited the legislative history of section 1988, finding that the purpose of the Fees Act was to provide a remedy necessary to obtain compliance with civil rights laws, and to promote respect for civil rights through effective citizen enforcement thereof. *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, — 106 S.Ct. 3088, 3096 (1986) ("*Pennsylvania I*"); *Evans v. Jeff D.*, 475 U.S. 717, —, 106 S.Ct. 1531, 1539 (1986). Unless the attorney's fee reimbursement pursuant to section 1988 is "'*full and complete*', the statutory rights [created by civil rights legislation] would be meaningless because they would remain largely unenforced." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, — U.S. —, —, 107 S.Ct. 3078, 3093 (1987) (Blackmun, J., dissenting) (emphasis added) ("*Pennsylvania II*").

Because most victims of civil rights violations are unable to afford legal representation, Congress found that the market itself would not provide adequate and effective access to the judicial process for vindication of rights violated. *Pennsylvania II*, — U.S. at —, 107 S.Ct. at 3092 (Blackmun, J., dissenting); *City of Riverside v. Rivera*, 477 U.S. 561, —, 106 S.Ct. 2686, 2695 (1986). Thus, to ensure that experienced competent attorneys would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case, at a rate mirroring the prevailing market rate in the relevant community. *Pennsylvania II*, — US. at —, 107 S.Ct. at 3095-96; *City of Riverside*, 477 U.S. at —, 106 S.Ct. at 2696; *Evans*, 475 U.S. at —, 106 S.Ct. at 1539; *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Reasonable section 1988 attorney's fees must be competitive with the private market for lawyers' services, *Pennsylvania II*, — U.S. at —, 107 S.Ct. at 3092, 3093, 3095 (Blackmun, J., dissenting), and "similar to what 'is traditional with attorneys compensated by a fee-paying client.'" *Id.* at 3093 (citation omitted). *See also City of Riverside*, 477 U.S. at —, 106 S.Ct. at 2695.

Attorneys in the private marketplace traditionally charge fee-paying clients for supervised work of a legal nature performed by legal assistants at a lesser hourly rate than that charged by attorneys. Separate billing for the services of such non-legal personnel as legal assistants and law students is an "increasingly widespread custom." *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983).

> "In the not so distant past the court would have frowned upon the practice of billing paraprofessional time separate from attorney time just as it might if a firm separately recorded and billed the hours spent by a secretary on a specific client . . . , but the standing of paraprofessionals has improved significantly as special training has enabled them to undertake a wide variety of more sophisticated tasks previously assigned exclusively to higher priced lawyers. The advent and widespread use of the paraprofessional has meant that the cost of effective legal counsel has been reduced and its availability enhanced without impairing the quality or delivery of legal services." *In re Chicken Antitrust Litigation*, 560 F.Supp. 963, 977-78 (N.D.Ga.1980). (citation omitted).

See also Parise v. Riccelli Haulers, Inc., 692 F.Supp. 72 (N.D.N.Y. 1987). That attorney's fees include compensation for time spent by legal assistants reflects "the realities of the marketplace and of modern, progressive law office management." *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581, 589 (D.R.I. 1983).

This Court implicitly recognized and encouraged the traditional marketplace use of non-lawyer personnel in the delivery of legal services by approving an award of attorney's fees, pursuant to section 1988, which included compensation for time spent by a law clerk. *City of Riverside*, 477 U.S. at —, 106 S.Ct. at 2690. Every federal circuit has likewise acknowledged the validity of delegating work of a legal nature to non-lawyer personnel under the supervision of an attorney by compensating for the work

of legal assistants or law clerks pursuant to section 1988,[4] or to an analogous fee-shifting statute or rule.[5]

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[4] First Circuit: *Jacobs v. Mancuso*, 825 F.2d 559, 563 (1st Cir. 1987); *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980); Third Circuit: *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir.1987) (fee reductions would be approved which should have been performed by paralegals); Fourth Circuit: *Vaughns v. Board of Educ. of Prince George's County*, 770 F.2d 1244, 1245-46 (4th Cir.1985); Fifth Circuit: *Heath v. Brown*, 807 F.2d 1229, 1232 (5th Cir.1987); Sixth Circuit: *Stewart v. Rhodes*, 656 F.2d 1216, 1217 (6th Cir.1981), *cert. denied*, 455 U.S. 991 (1982); *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir.1979), *cert. denied*, 447 U.S. 911 (1980); Seventh Circuit: *Ustrak v. Fairman*, No. 87-2057 (7th Cir. July 13, 1988); *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); Eighth Circuit: *Jenkins v. Missouri*, 838 F.2d 260, 266 (8th Cir.), *petition for cert. filed*, July 9, 1988; Ninth Circuit: *Keith v. Volpe*, 833 F.2d 850, 859 (9th Cir. 1987); *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir.1987); Tenth Circuit: *Lucero v. City of Trinidad*, 815 F.2d 1384, 1385 (10th Cir.1987); *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir.1983); Eleventh Circuit: *Walters v. City of Atlanta*, 803 F.2d 1135, 1151 (11th Cir.1986).

[5] Second Circuit: *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 238 (2d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 289 (1987) (class action); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974); (anti-trust class action); Third Circuit: *Brinker v. Guiffrida*, 798 F.2d 661, 668 (3d Cir.1986) (recovery for law clerk under Equal Access to Justice Act); *Citizen's Council of Del. County v. Brinegar*, 741 F.2d 584, 596 (3d Cir.1984) (Equal Access to Justice Act); Fourth Circuit: *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 974 (4th Cir. 1987) (law clerk under Fair Credit Reporting Act, 15 U.S.C. § 1681); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 339-40 n.28 (4th Cir.1983), *cert. denied*, 466 U.S. 951 (1984) (employment discrimination); Fifth Circuit: *Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc.*, 835 F.2d 541, 546 (5th Cir.1987); *Alter Fin. Corp. v. Citizens & Southern Int'l Bank of New Orleans*, 817 F.2d 349, 350 (5th Cir.1987) (sanctions, 28 U.S.C. § 1927); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983) (Title VII sex discrimination class action); Sixth Circuit: *Chandler v. Secretary of Dept. of*

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B. Compensating for the work of legal assistant time promotes the cost-effective delivery of legal services and enhances the quality of legal services.

Compensating for the work of legal assistant time as attorney's fees under Section 1988 "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). Skilled legal assistants are capable of performing some work of a legal nature which would otherwise have to be done by an attorney. To the extent that such work is done by supervised legal assist-

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Health & Human Services, 792 F.2d 70, 73 (6th Cir.1986) (Social Security Act, 42 U.S.C. § 406); Seventh Circuit: *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d 601, 609 (7th Cir.1986), *cert. denied*, — U.S. —, 108 S.Ct. 82 (1987) (employment discrimination action, 42 U.S.C. § 2000e); *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1249-50 (7th Cir.1982), *aff'd*, 465 U.S. 752 (1984) (anti-trust, 15 U.S.C. § 1 *et seq.*); Eighth Circuit: *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 817 (8th Cir.1983) (employment discrimination, 42 U.S.C. § 2000e); Ninth Circuit: *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir.1982) (employment discrimination, 42 U.S.C. § 2000e); *Todd Shipyards Corp. v. Director, Office of Workers' Compensation*, 545 F.2d 1176, 1182 (9th Cir. 1976) (Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 n.19 (9th Cir.1975), *cert. denied*, 425 U.S. 959 (1976) (anti-trust, 15 U.S.C. § 1 *et seq.*); Tenth Circuit: *Kopunec v. Nelson*, 801 F.2d 1226, 1229 (10th Cir.1986) (Equal Access to Justice Act); Eleventh Circuit: *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982) (employment discrimination, 42 U.S.C. § 2000e); D.C. Circuit: *Wilkett v. Interstate Commerce Comm'n*, 844 F.2d 867, 877 (D.C.Cir.1988) (law clerk; Equal Access to Justice Act); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 n.7 (D.C.Cir.1987) (*en banc*) (Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201).

ants at substantially less cost per hour than would have been the case had the work been done by attorneys, the overall cost of legal services to the public is reduced. A rule prohibiting recovery for legal assistant time would discourage the cost-effective delivery of legal services.[6]

In addition to reducing the cost of litigation, the use of legal assistants enhances the quality of legal representation. Legal assistants enable the attorney to spend his or her more costly time for greater productivity in more important areas where judgment and decision-making are required. The availability of legal assistants also promotes more thorough trial preparation by permitting a more efficient and economical utilization of staff time. *Chapman v. Pacific Tel & Tel. Co.*, 456 F.Supp. 77, 83 (N.D. Cal. 1978). *See also Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1176, 1182 (9th Cir. 1976); *Beamon v. City of Ridgeland, Miss.*, 666 F.Supp. 937, 946 (S.D.Miss. 1987).

Consistent with the private market billing procedure, a majority of federal trial and appellate courts approve compensation of legal assistant work hours based upon a reasonable hourly rate set lower than the hourly rate of attorneys but sufficient to defray the cost of overhead.[7]

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[6] *See, e.g., Jacobs*, 825 F.2d at 563 *Spray-Rite Serv. Corp.*, 684 F.2d at 1250; *Todd Shipyards Corp.*, 545 F.2d at 1182; *Shorter v. Valley Bank & Trust Co.*, 678 F.Supp. 714, 724 (N.D.Ill.1988); *Royal Crown Cola Co. v. Coca-Cola Co.*, 678 F.Supp. 875, 880 (M.D.Ga.1987); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F. Supp. 77, 83 (N.D.Cal.1978).

[7] *E.g., Ustrak*, No. 87-2057 (7th Cir. July 13, 1988); *Wilkett*, 844 F.2d at 877; *Jenkins*, 838 F.2d at 266; *Save Our Cumberland Mountains, Inc.*, 826 F.2d at 54 n.7; *Toussaint*, 826 F.2d at 904;

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See Jacobs v. Mancuso, 825 F.2d 559, 563 n.6 (1st Cir. 1987) (legal assistant expenses are most frequently reimbursed based on an hourly fee). This Court, in *City of Riverside, supra*, approved an attorney's fee award which included compensation for time spent by a student law clerk, at the rate of twenty-five dollars an hour, clearly more than the actual wages paid to the individual, and obviously high enough to cover the overhead costs associated with the non-lawyer employee. *See* 477 U.S. at —, 106 S.Ct. at 2690 & n.2.

While some courts have viewed legal assistant work as a "cost" to be reimbursed[8], most award compensation at

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Jacobs, 825 F.2d at 563 & n.6; *In re "Agent Orange" Prod. Liab.*, 818 F.2d at 230, 238; *Lucero*, 815 F.2d 1384, 1386; *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d at 609; *Heath*, 807 F.2d at 1232; *Kopunec*, 801 F.2d at 1229; *Citizen's Council of Del. County*, 741 F.2d at 596; *Richardson*, 709 F.2d at 1023; *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 273 (6th Cir.1983); *Strama v. Peterson*, 689 F.2d 661, 663 (7th Cir.1982); *Stewart v. Rhodes*, 656 F.2d at 1216-17; *Todd Shipyards Corp.*, 545 F.2d at 1182.

[8] To highlight the need for this Court's guidance, several courts have allowed the recovery of compensation for the work of legal assistants or law clerks based on an hourly-rate while at the same time calling it compensation for "expenses," rather than attorney's fees. *See In re "Agent Orange" Product Liab. Litig.*, 818 F.2d at 238; *Yaris v. Special School Dist. of St. Louis County*, 661 F.Supp. 996, 1002, 1003 n.9 (E.D.Mo.1987); *PPG Industries, Inc. v. Celanese Polymer Specialties Co.*, 658 F.Supp. 555, 560, 565 (W.D.Ky.1987), *rev'd on other grounds*, 840 F.2d 1565 (Fed.Cir.1988). Some courts have held that law firms may only recover their paralegal "out of pocket" expenses, *see Thornberry*, 676 F.2d at 1244 (citing *Northcross*, 611 F.2d at 639), while others have permitted reimbursement for salary actually paid to a legal assistant, with no additional compensation for fringe benefits or overhead. *See, e.g., City of Detroit,*

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an hourly rate for legal assistant work as a part of the attorney's fee. *Jenkins v. State of Missouri*, 838 F.2d 260, 266 (8th Cir.), *petition for cert. filed*, July 9, 1988. Law firms in the private marketplace routinely include an hourly rate charge for legal assistants as part of the attorney's fee charged fee-paying clients. Indeed, seventy-six percent of 1,700 legal assistants responding to a recent survey indicated that their law firm received compensation for their work from clients on an hourly billing rate basis. National Association of Legal Assistants, Inc., 1986 National Utilization and Compensation Survey Report (1987). "Law firms, like other businesses that sell time, must set their hourly rates at an amount greater than that needed to pay their attorneys' or paralegals' salaries; they must figure into those rates all their costs of doing business." *In re Burlington Northern Inc. Employment Practices Litig.*, 810 F.2d 601, 609 (7th Cir. 1986), *cert. denied*, — U.S. —, 108 S. Ct. 82 (1987). The hourly rate of legal assistants must reflect not only base

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495 F.2d at 473; *Illinois Migrant Council v. Pilliod*, 672 F.Supp. 1072, 1084 (N.D.Ill.1987); *Campaign for a Progressive Bronx v. Black*, 631 F.Supp. 975, 983 (S.D.N.Y.1986). Still others refuse to provide separate compensation for the work of legal assistants, taking the position that legal assistants represent overhead, such as clerical and office expenses, all covered by the attorney's hourly rate. *See Abrams v. Baylor College of Medicine*, 805 F.2d 528, 535 (5th Cir.1986); *Roe v. City of Chicago*, 586 F.Supp. 513, 516 & n.6 (N.D.Ill.1984). *But see Chapman*, 456 F.Supp. at 82 (because the work of paralegals and law clerks is ordinarily charged directly to a particular litigation, if treated as an overhead expense payable out of the general receipts of the attorney, the across-the-board cost of services to attorney's clients would be burdened by paralegal costs incurred in connection with matters of no interest or benefit to other clients).

salary, but also fringe benefits and a proportionate share of firm overhead.[9]

C. The inclusion of compensation for legal assistants in an attorney's fee award does not offend ethical and legal tenets prohibiting the unauthorized practice of law.

Any objection to including compensation for the supervised legally-related work of legal assistants with a reasonably attorney's fee award because they are not attorneys is but a "technical" one. The work performed by legal assistants is work of the type necessary to the prosecution of the litigation which would otherwise be performed by attorneys. Indeed, this Court has recognized the validity of non-lawyer personnel performing services of a legal nature. In *Procunier v. Martinez*, 416 U.S. 396 (1974), the Court affirmed the striking of a prison administrative rule banning attorney-client interviews conducted by law students or legal paraprofessionals as constituting an unjustified restriction on the right of access to the courts. The Court agreed with the trial court's finding that prohibiting the use of law students or other paraprofessionals from conducting attorney-client interviews with prisoners would inhibit adequate professional representation of indigent inmates, or alternatively, increase the cost of legal representation for prisoners. *Id.* at 419-20. Likewise, in *Johnson v. Avery*, 393 U.S. 483 (1969), the Court struck down a prison regulation pro-

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[9] *See Schwartz v. Novo Industri, A/S*, 119 F.R.D. 359, 365 (S.D. N.Y.1988) (citation omitted). *See also Williams v. Bowen*, 684 F.Supp. 1305, 1308 (E.D.Pa.1988); *Garmong v. Montgomery County*, 668 F.Supp. 1000, 1011 (S.D.Tex.1987); *Brewer v. Southern Union Co.*, 607 F.Supp. 1511, 1528 (D.Colo.1984).

hibiting any inmate from advising or assisting another in the preparation of legal documents. The Court noted that "the type of activity involved here—preparation of petitions for post-conviction relief—though historically and traditionally one which may benefit from the services of a trained and dedicated lawyer, is a function often, perhaps generally, performed by a layman." *Id.* at 490 n.11. *See also City of Riverside,* 477 U.S. at —, 106 S.Ct. at 2690 (affirming attorney fee award which included compensation for work performed by a law clerk).

Compensation for lawyer-supervised legally-related work performed by legal assistants conforms with the ethical canons and disciplinary codes governing lawyers and legal assistants. Lawyers are obligated to keep fees in check and take steps to provide efficient, cost-effective legal services. *See* ABA Model Code of Professional Responsibility EC 2-18 and DR 2-106(A)(B) (1976); ABA Model Rules of Professional Conduct, Rule 1.5(a) (1984). The delegation of tasks to lay persons is proper "if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently." Model Code EC 3-6. *See also* Model Rules, Rule 5.3.[10] Because the lawyer, or law

[10] The American Bar Association emphasizes that the work of a legal assistant "involves the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistance, the attorney would perform the task." ABA Standing Committee on Legal Assistants, Position Paper on the Question of Licensure or Certification (1986).

firm, is the recipient of an attorney's fee for legal services and not the salaried legal assistant, the inclusion of compensation for the supervised work of a legal assistant as part of a reasonable attorney's fee does not offend ethical rules prohibiting attorneys from sharing legal fees with laymen. *See* Model Code, EC 3-8 and DR 3-102.

Legal assistants recognize the ethical ramifications of their performance of legally-related work, and emphasize, in self-policing ethics codes and guidelines, that legal assistants shall not undertake tasks which are required to be performed by an attorney, such as setting fees, giving legal advice, or appearing in any way to a court, the client, or the public to be practicing law.[11] Additionally, the rules stress that all work of a legal nature performed by a legal assistant must be delegated and supervised by an attorney, who retains ultimate responsibility to the client and assumes full professional responsibility for the work product. National Association of Legal Assistants Code of Ethics and Professional Responsibility (1975); National Association of Legal Assistants Model Standards and Guidelines for Utilization of Legal Assistants (1984) (both reprinted in full in the

[11] Though the American Bar Association has shied away from defining what constitutes the practice of law, ABA Code of Professional Responsibility, it notes that "[f]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer," ABA Model Code of Professional Responsibility, EC 3-5 (1976). Courts faced with the question have attempted to craft a definition. For example, the Florida Supreme Court has stated that the giving of advice and the performance of services which affect important rights of a person under the law, and require legal skill and knowledge of the law greater than that possessed by the average citizen, constitutes the practice of law. *The Florida Bar v. Brumbaugh,* 355 So.2d 1186, 1191 (Fla. 1978).

Appendix to this brief). It is the close supervision by an attorney which keeps the legally-related work of a legal assistant from treading upon the prohibited and unacceptable unauthorized practice of law, and makes the work of a legal assistant no more than an extension of the work of an attorney at a less costly rate[12].

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[12] Courts awarding attorney's fees for the supervised work of legal assistants have delineated examples of legal services which would otherwise be performed by an attorney, and thus which are compensable if performed by a legal assistant. They include: investigation of the facts relating to the action, *In re Gas Meters Antitrust Litig.*, 500 F.Supp. 956, 969 (E.D.Pa.1980); assisting with discovery, including such tasks as statistical and financial analysis, inspection and production of documents, review of answers to interrogatories, and the compilation of statistical and financial data, *Bagel Inn, Inc. v. All Star Dairies*, 539 F.Supp. 107, 111 (D.N.J.1982); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 967; *see also, e.g., Richardson*, 709 F.2d at 1023; *Spray-Rite Service Corp.*, 684 F.2d at 1250; doing legal research, *Morgan v. Nevada Board of State Prison Comm'rs*, 615 F.Supp. 882, 885 (D.Nev.1985); locating and interviewing witnesses, *Richardson*, 709 F.2d at 1023; *Garmong*, 668 F.Supp. at 1011; organizing and communicating with class members, *Richardson, supra; Edmonds v. United States*, 658 F.Supp. 1126, 1136 (D.S.C. 1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 970; assisting with preparation for deposition and trial, and organizing exhibits, *Easter House v. State of Illinois, Dept. of Children and Family Services*, 663 F.Supp. 456, 460 (N.D.Ill.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 972; assisting with preparation of settlement and settlement administration, *In re Chicken Antitrust Litig.*, 560 F.Supp. 963, 978 (N.D.Ga.1980); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 967, 972; compiling statistical and financial data, *Bagel Inn, Inc.*, 539 F.Supp. at 111; drafting pleadings, *Parise v. Riccelli Haulers, Inc.*, 692 F.Supp. 72, 75 (N.D.N.Y.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 969; and checking legal citations, *Beamon v. City of Ridgeland, Miss.*, 666 F.Supp. 937, 943 (S.D.Miss.1987).

D. Courts scrutinize attorney's fee applications to assure the hourly rates of legal assistants and the time spent and nature of the work performed by legal assistants are all reasonable.

Courts compensating for the work performed by a legal assistant in connection with the award of a reasonable attorney's fee scrutinize the reported hours, the suggested rate, and the nature of the work performed in the same manner they scrutinize lawyer time and rates. *See Pennsylvania I*, 478 U.S. at —, 106 S.Ct. at 3098; *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Ramos*, 713 F.2d at 559. Trial courts determine what portion of the work is of a clerical nature and is thus absorbed as part of the office overhead reflected in the attorney's billing rate and what portion of the work performed by the legal assistant constitutes legal services traditionally done by an attorney and which would otherwise be performed by an attorney at a costlier rate. *Ramos*, 713 F.2d at 558; *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983). "Such expenses are separately recoverable only as part of a prevailing party's award for attorney's fees and expenses, and even then only to the extent that the paralegal performs work traditionally done by an attorney. Otherwise, paralegal expenses are separately unrecoverable overhead expenses." *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir.Unit B 1982).

Indeed, when considering a reasonable attorney's fee award, courts have chastised attorneys for doing work which more properly could have been delegated to a legal assistant under the attorney's supervision, and have penalized the attorney by lowering the hourly rate charged.

> "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir.1974).

Wasteful utilization of expensive legal talent for work that may be delegated to non-lawyers is not condoned. "Routine tasks, if performed by senior partners in large firms, should not be billed at their usual rates. A Michelangelo should not be charged Sistine Chapel rates for painting a farmer's barn." *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir.1983). Accordingly, courts regularly reduce an attorney's hourly rate to that traditionally charged for a legal assistant, to reflect the nature of the legal work performed.[13]

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[13] *See, e.g., Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, —, —, 106 S.Ct. 3088, 3092, 3099 (1986) ("*Pennsylvania I*"), (approving a lodestar which set different hourly rates for legal work requiring varying degrees of legal ability); *Daggett v. Kimmelman*, 811 F.2d at 799 (attorney hours devoted to tasks which should have been performed by associates or paralegals would warrant an hourly fee reduction); *Northcross*, 611 F.2d at 637, (necessary services performed by attorneys which could have reasonably been performed by less expensive personnel may be compensated at a lower rate than attorney's normal billing rate); *Drez v. E. R. Squibb & Sons, Inc.*, 674 F.Supp. 1432 (D.Kan1987) (dropping attorney billing rate to law clerk rate where three attorneys sat through trial); *Beamon*, 666 F.Supp. at 941-42 (attorney fees for purely clerical work which is easily delegable granted at reduced hourly rate); *Skelton v. General Motors Corp.*, 661 F.Supp. 1368, 1385 (N.D. Ill.1987) (court reduces time of attorney spent on administrative tasks); *Metro Data Systems, Inc. v. Durango Systems, Inc.*, 597 F.Supp. 244, 246 (D.Ariz.1984) (gathering information and drafting answers to interrogatories not recoverable by attorney as work which could have been performed by paralegal).

E. Permitting recovery for work of legal assistants promotes the availability of legal representation to victims of civil rights violations.

If the lawyer attempts to absorb the cost of the legal assistant into his or her regular hourly rate as an overhead expense, as is done for clerical work and office supplies, then all persons employing that attorney, including victims of civil rights violations, would suffer a higher hourly rate, regardless of whether their case necessitated the assistance of a legal assistant. More likely, the work currently performed by legal assistants would be done by attorney associates and billed at the higher attorney associate rate, clearly decreasing the utilization of legal assistants and increasing the cost of litigation. The attorney performing legal tasks which could be delegated to a legal assistant, however, faces the risk that his or her fee will be reduced by a court as being unreasonably high for the quality of work performed. The only remaining alternative would be for the attorney to perform the work at a reduced rate, below and not competitive with the market rate. Such a result would make the representation of victims of civil rights violations cost prohibitive and unattractive, and discourage competent, experienced attorneys from undertaking such representation because they could not receive full compensation for their efforts.

The widespread practice of assigning less technical yet legal work to legal assistants to be performed under the supervision of an attorney promotes economy and efficiency in the administration of justice. Permitting reasonable compensation for such services as part of a reasonable attorney's fee encourages this desirable practice,

and makes legal representation more readily available to victims of civil rights violations, in accord with Congress' intent when adopting the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988.

CONCLUSION

For the reasons set forth above, the National Association of Legal Assistants, Inc., as *amicus curiae,* respectfully urges the Court to reverse the decision of the Court of Appeals for the Fifth Circuit and permit recovery for the work of legal assistants as part of a reasonable attorney's fee award made pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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APPENDIX

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CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY

It is the responsibility of every legal assistant to adhere strictly to the accepted standards of legal ethics and to live by general principles of proper conduct. The performance of the duties of the legal assistant shall be governed by specific canons as defined herein in order that justice will be served and the goals of the profession attained. The canons of ethics set forth hereafter are adopted by the National Association of Legal Assistants, Inc., as a general guide and the enumeration of these rules does not mean there are not others of equal importance although not specifically mentioned.

Canon 1. A legal assistant shall not perform any of the duties that lawyers only may perform nor do things that lawyers themselves may not do.

Canon 2. A legal assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a direct relationship with the client, and assumes full professional responsibility for the work product.

Canon 3. A legal assistant shall not engage in the practice of law by accepting cases, setting fees, giving legal advice or appearing in court (unless otherwise authorized by court or agency rules).

Canon 4. A legal assistant shall not act in matters involving professional legal judgment as the services of a lawyer are essential in the public interest whenever the exercise of such judgment is required.

Canon 5. A legal assistant must act prudently in determining the extent to which a client may be assisted without the presence of a lawyer.

Canon 6. A legal assistant shall not engage in the unauthorized practice of law.

Canon 7. A legal assistant must protect the confidence of a client, and it shall be unethical for a legal assistant to violate any statute now in effect or hereafter to be enacted controlling privileged communications.

Canon 8. It is the obligation of the legal assistant to avoid conduct which would cause the lawyer to be unethical or even appear to be unethical and loyalty to the employer is incumbent upon the legal assistant.

Canon 9. A legal assistant shall work continually to maintain integrity and a high degree of competency throughout the legal profession.

Canon 10. A legal assistant shall strive for perfection through education in order to better assist the legal profession in fulfilling its duty of making legal services available to clients and the public.

Canon 11. A legal assistant shall do all things incidental, necessary or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

Canon 12. A legal assistant is governed by the American Bar Association Code of Professional Responsibility.

NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC.

MODEL STANDARDS AND GUIDELINES FOR UTILIZATION OF LEGAL ASSISTANTS

PREAMBLE

Proper utiliziation of the services of legal assistants affects the efficient delivery of legal services. Legal assistants and the legal profession should be assured that some measures exist for identifying legal assistants and their role in assisting attorneys in the delivery of legal services. Therefore, the National Association of Legal Assistants, Inc., hereby adopts these Model Standards and Guidelines as an educational document for the benefit of legal assistants and the legal profession.

DEFINITION

Legal assistants* are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

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* Within this occupational category some individuals are known as paralegals.

STANDARDS

A legal assistant should meet certain minimum qualifications. The following standards may be used to determine an individual's qualifications as a legal assistant:

1. Successful completion of the Certified Legal Assistant (CLA) examination of the National Association of Legal Assistants, Inc.; (see attached Exhibit A)
2. Graduation from an ABA approved program of study for legal assistants;
3. Graduation from a course of study for legal assistants which is institutionally accredited but not ABA approved, and which requires not less than the equivalent of 60 semester hours of classroom study;
4. Graduation from a course of study for legal assistants, other than those set forth in (2) and (3) above, plus not less than six months of in-house training as a legal assistant;
5. A baccalaureate degree in any field, plus not less than six months in-house training as a legal assistant;
6. A minimum of three years of law-related experience under the supervision of an attorney, including at least six months of in-house training as a legal assistant; or
7. Two years of in-house training as a legal assistant.

For purposes of these standards, "in-house training as a legal assistant" means attorney education of the employee concerning legal assistant duties and these guidelines. In addition to review and analysis of assignments, the legal assistant should receive a reasonable amount of

instruction directly related to the duties and obligations of the legal assistant.

GUIDELINES

These guidelines relating to standards of performance and professional responsibility are intended to aid legal assistants and attorneys. The responsibility rests with an attorney who employs legal assistants to educate them with respect to the duties they are assigned and to supervise the manner in which such duties are accomplished.

Legal assistants should:

1. Disclose their status as legal assistants at the outset of any professional relationships with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public;
2. Preserve the confidences and secrets of all clients; and
3. Understand the attorney's Code of Professional Responsibility and these guidelines in order to avoid any action which would involve the attorney in a violation of that Code, or give the appearance of professional impropriety.

Legal assistants should not:

1. Establish attorney-client relationships; set legal fees; give legal opinions or advice; or represent a client before a court; nor
2. Engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law.

Legal assistants may perform services for an attorney in the representation of a client, provided:

1. The services performed by the legal assistant do not require the exercise of independent professional legal judgment;
2. The attorney maintains a direct relationship with the client and maintains control of all client matters;
3. The attorney supervises the legal assistant;
4. The attorney remains professionally responsible for all work on behalf of the client, including any actions taken or not taken by the legal assistant in connecction therewith; and
5. The services performed supplement, merge with and become the attorney's work product.

In the supervision of a legal assistant, consideration should be given to:

1. Designating work assignment that correspond to the legal assistant's abilities, knowledge, training and experience.
2. Educating and training the legal assistant with respect to professional responsibility, local rules and practices, and firm policies;
3. Monitoring the work and professional conduct of the legal assistant to ensure that the work is substantively correct and timely performed;
4. Providing continuing education for the legal assistant in substantive matters through courses, institutes, workshops, seminars and in-house training; and
5. Encouraging and supporting membership and active participation in professional organizations.

Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's Code of Professional Responsibility; and within the

preceding parameters and proscriptions, a legal assistant may perform any function delegated by an attorney, including, but not limited to the following:

1. Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervision of the attorney.
2. Locate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant.
3. Conduct investigations and statistical and documentary research for review by the attorney.
4. Conduct legal research for review by the attorney.
5. Draft legal documents for review by the attorney.
6. Draft correspondence and pleadings for review by and signature of the attorney.
7. Summarize depositions, interrogatories, and testimony for review by the attorney.
8. Attend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney.
9. Author and sign letters provided the legal assistant's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.

EXHIBIT A

To become eligible to sit for the Certified Legal Assistant (CLA) examination, candidates must meet one of the following requirements:

1. Graduation from an ABA approved legal assistant training course or graduation from a legal assistant training course at a school which is institutionally accredited;
2. Graduation from a legal assistant course neither approved by the ABA nor at an institutionally accredited school plus two (2) years experience as a legal assistant.
3. A bachelor's degree in any field plus one (1) year experience as a legal assistant;
4. Successful completion of the PLS (Professional Legal Secretary) examination with five (5) years law related experience under the supervision of a member of the bar (Note: This optional requirement is open until 1986.);
5. Seven (7) years law related experience under the supervision of a member of the bar (Note: This optional requirement is open until 1986.).

Once admitted to the program, the applicant must successfully complete an eleven hour examination covering general skills required of all legal assistants plus knowledge of four substantive areas of the law.

The CLA designation is for a period of five years and if the CLA submits proof of continuing education in accordance with the stated requirements, the certificate is renewed for another five years. Lifetime certification is not permitted.

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